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## Defining the Limits of Crime Control and Due Process

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# REVIEW ESSAY

## Defining the Limits of Crime Control and Due Process

THE LIMITS OF LAW ENFORCEMENT; by Hans Zeisel.<sup>†</sup> Chicago: University of Chicago Press, 1982. Pp. xvi, 245. \$20.00.

*Reviewed by Richard S. Frase<sup>‡</sup>*

In his latest book, Hans Zeisel argues that "law enforcement, important and essential as it is, cannot by itself significantly reduce crime" (p. 15). Thus, he concludes, we should redirect our efforts toward general prevention, starting with improvements in ghetto schools. Zeisel's thesis is supported by data from his study of the disposition of felony arrests in New York City<sup>1</sup> and is supplemented by his assessment of the results of recent criminal justice research in other jurisdictions. Zeisel, a pioneer in the application of social science research methods to issues of law and public policy,<sup>2</sup> presents a wealth of data in a very clear and readable form, suitable for his primary intended audience: "the concerned citizen" and "those engaged in law enforcement and crime control" (p. 4). If such readers believe that improved law enforcement can

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1. This study analyzed two samples of defendants. The first consisted of a randomly selected group of 1,888 felony arrests made in 1971 in four of the five boroughs of New York City (excluding Staten Island); the second included 369 defendants arraigned on felony charges whose cases reached disposition between January and October of 1973 (pp. 8-10). The data in the first sample were based on computerized court records as well as manual retrieval of information from the case files. The data in the second sample were based on these same sources, but also included the results of interviews with the major participants in the case—i.e., the arresting police officer, defense counsel, prosecutor, and judge (pp. 8-10).

The basic data from the New York City felony arrest disposition study were previously reported in a monograph published as VERA INSTITUTE OF JUSTICE, FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS (1977) [hereinafter cited as VERA MONOGRAPH]. As discussed more fully below, *see infra* text accompanying note 18, Zeisel's analysis goes considerably beyond the *Vera Monograph* in a number of important respects, although the latter does report some information not contained in Zeisel's book.

2. *See, e.g.*, H. KALVEN, JR. & H. ZEISEL, THE AMERICAN JURY (1966); H. ZEISEL, SAY IT WITH FIGURES (5th ed. 1968); H. ZEISEL, H. KALVEN, JR. & B. BUCHHOLZ, DELAY IN THE COURT (1959); Casper & Zeisel, *Lay Judges in the German Criminal Courts*, 1 J. LEGAL STUD. 135 (1972); Zeisel & Diamond, *Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut*, 1977 AM. BAR FOUND. RESEARCH J. 883.

drastically reduce crime,<sup>3</sup> they would do well to read this book. Zeisel persuasively demonstrates the unlikelihood of ever achieving such reductions in this country, and perhaps in any Western democracy.

But there is a critical ambiguity in Zeisel's limits-of-law-enforcement thesis. Since he does not define what he means by "significant" crime reduction, it is unclear whether he is *only* ruling out drastic reductions (for example, twenty-five percent or more), or whether he believes that most American jurisdictions cannot even make *noticeable, non-trivial, or statistically significant* reductions in their present crime rates. Perhaps he believes that law enforcement has so little impact that we could even *reduce* enforcement levels without noticeably increasing the incidence of crime. But whatever Zeisel's intent, the ambiguity of his thesis—coupled with the forceful manner of its presentation—may well lead his intended nonacademic readers to construe the thesis broadly. Part I of this Review argues that Zeisel's data do not support such a pessimistic assessment and concludes that there is much we still do not know about the limits of law enforcement as a method of crime control. Part I also addresses Zeisel's suggestion that we *can* achieve "significant" crime reductions by improving our schools. This part of his thesis has even less empirical support, and raises troubling issues if such improvements are to be achieved by taking resources away from the criminal justice system.

Actually, much of Zeisel's book and its supporting data implies that we should be spending *more* on criminal justice, not to achieve better crime control, but to improve the *quality* of justice—its consistency, rationality, and fairness. Scattered throughout the book, but never stated as forcefully or succinctly as the limits-of-law-enforcement thesis, is a second thesis: that the criminal justice system is badly in need of reform, particularly in the areas of plea bargaining and pretrial detention, and that we need much better system-wide statistics and more studies like the one in New York City to guide these reform efforts (pp. 51-52, 208-31). This thesis is amply demonstrated by Zeisel's New York City data, but it is likely to be overlooked by most readers, due to the book's overwhelming emphasis on the limits-of-law-enforcement thesis and to its unusual

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3. Such unrealistic expectations are not uncommon. See, for example, NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, A NATIONAL STRATEGY TO REDUCE CRIME (1973), in which the Commission announced the following goals for crime reduction in the 10-year period 1973-83: the number of "high fear" crimes (i.e., murder, nonnegligent manslaughter, forcible rape, robbery, aggravated assault, and burglary when committed by a stranger in public) should be *cut in half*; and the number of all offenses listed above, whether or not committed by a stranger, should be *cut between 25% and 50%* depending on the offense. *Id.* at 7. Although the Commission noted that these goals are "aspirations, not predictions," it was "confident that by improved effort, including use of the standards and recommendations presented elsewhere in its reports, the goals can be attained." *Id.* at 8.

organization (described below). Part II of this Review examines Zeisel's implicit research-and-reform thesis and its supporting data and suggests the important areas where we need further research and policy analysis. It concludes that this thesis is *more* important for nonacademic readers of the 1980's to understand and act upon than the limits-of-law-enforcement thesis that Zeisel chose to emphasize. Part II also concludes that the book is at least as valuable to academics as to the intended audience, and that it merits careful reading by anyone interested in criminal justice research and reform. Such readers will find in Zeisel's book unique data and research methods for measuring the impact of plea bargaining concessions on sentencing, a skillful blending of new and old data on almost every aspect of criminal justice in New York City, and a model of how to design and carry out system-wide research on law enforcement and criminal case processing.

Zeisel's book, like the criminal justice system itself, is schizophrenic, recognizing both crime control and due process values. Indeed, this is really two books in one, for two kinds of readers, and pointing toward two very different conclusions. Both books are extremely valuable, but each is likely to be misinterpreted or ignored by many readers. Nonacademic readers may interpret Zeisel's limits-of-law-enforcement thesis too broadly, while disregarding his need-for-research-and-reform message. Academics may not read the book at all, since it is not addressed to them—yet the book presents unique data and research methods, critically important to improving the quality as well as the crime-control effectiveness of the criminal justice system.

The organization and focus of the book further limit its usefulness. The limits-of-law-enforcement thesis and some of the New York City data are presented in chapter one, which Zeisel characterizes as his conclusion, moved to an unconventional location. Chapters two through five present the remaining data from the New York City study, which Zeisel, in his words, has kept "deliberately lean, free from critical comment" to "allow the critical reader to appreciate the value of the findings even if he or she disagrees with my reflections" in chapter one (pp. 4-5). The resulting bifurcation of data presentation and analysis makes some of the most important findings of the New York City study difficult to understand. Moreover, Zeisel's preoccupation with his limits-of-law-enforcement thesis prevents him from fully developing the important research and reform implications of his data.

Thus, the purpose of this Review is to demonstrate the hidden virtues of Zeisel's book as well as its limitations, to show both how much Zeisel has told us and how much we still need to learn about the crime control and due process limits of law enforcement. Part I first examines the limits of Zeisel's crime-control or limits-of-law-enforcement thesis.

Part II then addresses his implicit—but more important—thesis: the need for additional research about and reform of the criminal justice system.

## I

### HOW LIMITED IS LAW ENFORCEMENT?

Zeisel's primary thesis is supported by the following data and conclusions:

(1) "Attrition of law enforcement": even for serious felonies, the rates of victim reporting, arrest, conviction, and sentencing are so low that only three felons receive a felony prison sentence (over one year) for every 1000 felonies committed in New York City (p. 18, figure 3);

(2) These high attrition rates are relatively stable in New York City over time (p. 23, figure 6), and are similar to those found in other American jurisdictions (p. 22, figure 5) and in several European criminal justice systems (p. 24, figure 7);

(3) It is difficult to increase arrest and conviction rates, given the limited evidence available to the police and the frequent reluctance of victims to report or persevere in their complaints (pp. 25-34);

(4) Substantial charge and sentence concessions are routinely offered in plea bargaining, but they can only be avoided by increasing the cost of the system and lowering the conviction rate (pp. 51-52);

(5) The relatively large number of bail jumpers would be costly to reduce, and would only improve conviction rates for offenses of lower severity (pp. 51-52);

(6) Increased sentencing severity for the few convicted defendants would not significantly increase incapacitative or deterrent effects (pp. 53-68); and

(7) The consistent relationship between crime rates and adverse social and economic conditions suggests that the criminal justice system acts too late in the development of most offenders' criminality to have any preventive or curative effects (pp. 68-87).

Zeisel thus concludes that crime prevention "must start early. The place to begin is the nursery school" (p. 87). The school is the key because "it remains the only institutional point of access society has" to these potential delinquents, and there is some data suggesting a causal relationship between school absenteeism and delinquency. Moreover, we must begin in nursery school because "[b]y the time boys enter high school, criminal patterns may be firmly entrenched" (p. 87). In Zeisel's idealistic vision, schools will "become cherished centers of the children's lives"; ghetto teachers will be "only the princes and princesses of the profession, who will establish bonds with their children that will hold

when the dangerous years begin and will endure until they are over" (pp. 87-88).

It is hard for any educator, parent, or idealist (I plead guilty on all counts) to criticize such a vision, particularly in view of the sorry state of many urban schools. In the best of all worlds, we would devote sufficient resources to these schools to achieve Zeisel's vision and still have enough left over to maintain at least a fair system of law enforcement, if not an effective one. And, of course, there are many good reasons other than crime control to improve our schools. Unfortunately, this is the age of massive federal deficits and "retrenchment" of state budget allocations; in such times, the danger is that money allocated to one good cause will be taken away from others—particularly when two "causes" are viewed as alternative ways of achieving the same goal.

The question then becomes one of relative marginal cost effectiveness: where will "the next billion dollars" do the most good? Zeisel argues that such resources will more effectively control crime if applied to the educational system. However, as Zeisel recognizes, that system is only one part of a "society that hesitates to grant full equality to the young men from the ghetto" (pp. 87-88); his answer is that reform of the schools must be just the beginning of our efforts to remove all of the social conditions that cause crime (p. 88).

Equal opportunity and elimination of racial prejudice are, like school reform, also highly laudable goals, and perhaps even more elusive. The history and literature certainly suggest that criminal justice reform is difficult and slow, but is broad social reform any easier? Perhaps Zeisel assumes that the public is more willing to pay for school and social reform than for reform of the criminal justice system, although this remains to be demonstrated. Alternatively, he might argue that small changes in the education system are more valuable at this point than small changes in the criminal justice system, even if neither has any demonstrable impact on crime rates. Yet Zeisel's own data certainly demonstrate the desperate need for reforms in the quality of criminal justice, and may suggest that they would not be prohibitively expensive (see Part II, below).

Since Zeisel has no data on the crime-reducing potential of school and social reforms, his argument that such reforms are more crime-control cost effective rests on his demonstration of the limits of law enforcement. As noted previously, however, it is not clear *how* limited Zeisel thinks law enforcement is. If he only rules out very large reductions in crime through improved law enforcement, then his assumption that school and social reforms can deliver greater reductions seems speculative at best. Such an assumption becomes more plausible the more limited law enforcement is shown to be, and seems quite probable if law

enforcement has little or no impact on crime.<sup>4</sup> If this is the case, school and social reforms would indeed be the only reasonable alternative. However, as discussed in some detail below, much of Zeisel's supporting data about the limits of law enforcement are subject to a less pessimistic (or at least, more agnostic) interpretation than he suggests. And if small improvements in crime control are possible from each of a number of reforms, the aggregate impact might well be substantial, at least for certain types of crime. Indeed, if our primary concern is with more serious crimes and repeat offenders, then limited resources applied to the handling of these cases in the criminal justice system may well be more effective than the use of the same resources to make general improvements in nursery school education.

Zeisel's overall "attrition" data is certainly dramatic. He makes the argument that if only 3.6 percent of felons are convicted and only 0.3 percent are sentenced to prison for more than one year, it is unlikely that criminal law enforcement can or will have any significant incapacitative, deterrent, or rehabilitative impact (p. 18, figure 3). However, the data in chapters two through four show that the more serious the offense, the more likely it will be reported to the police and lead to arrest, conviction, and incarceration (pp. 96, 98, 135-37, 163-64, 167, 169, 171, 173). Moreover, the attrition rates for offenses may understate the risk of eventual apprehension and punishment for offenders who commit more than one offense (p. 52, n.40)—the "we catch 'em sooner or later" theory. Zeisel attempts to counter this theory in a footnote with speculation that such habitual offenders may be more expert in avoiding arrest, confidently concluding that "[n]one of these considerations alters the conclusion that enforcement reforms, however necessary, will not significantly increase crime control" (p. 52, n.40).

Zeisel's comparisons to other cities and countries also offer equivocal proof that conviction rates cannot be "significantly" increased. He reports that conviction rates for felony arrests in other American cities in the early 1970's varied between thirty-seven and sixty percent (p. 22, figure 5), which certainly suggests the possibility of "significant" improvement in *some* of these jurisdictions. Nor is sixty percent necessarily the true "upper limit," since Zeisel's definition of a "conviction" apparently does not include parole or probation revocation, or conviction on collateral charges.<sup>5</sup> These jurisdictions may also differ significantly in their

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4. See *supra* text following note 3. Zeisel would not be the first writer to reach such a pessimistic conclusion. See, e.g., C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 173-216 (1978). Charles Silberman's book is reviewed by Albert Alschuler in Book Review, 46 U. CHI. L. REV. 1007 (1979).

5. I am assuming that Zeisel's definition of a "conviction" in these comparisons includes convictions on misdemeanor charges, since such cases are included in New York City "convictions." Apparently none of the statistics includes information on parole or probation revocation, conviction

conviction rates for specific offenses. Zeisel's comparison of prosecution rates for robbery in New York City, Germany, and Austria is also unconvincing, since the rates are based on different definitions.<sup>6</sup> I tend to agree with Zeisel that "one may easily overestimate the effect of procedural differences" between American and continental systems (p. 25, n.5),<sup>7</sup> but his data do not demonstrate that such differences have *no* effect. Finally, as to both American and international comparisons, we cannot look at a single step in the disposition process—arrest to conviction—and conclude that similar attrition rates demonstrate the "inherent" limits of law enforcement, because such comparisons assume that these jurisdictions all have similar attrition rates throughout the entire disposition process. What we still need to know is whether any of these jurisdictions succeeds in obtaining a significantly higher proportion of convictions (or "weighted" convictions—that is, the conviction rate times the average sentence severity) based on the total number of offenses committed. Such system-wide comparisons might reveal that most jurisdictions are even *more* similar than they appear in Ziesel's comparison. But if variations of the same magnitude (thirty to sixty percent) (p. 22, figure 5) remain, we should hasten to find out what the high conviction rate jurisdictions are doing "right."

Zeisel's analysis of the dismissed cases in the New York City study also leads him to conclude that dismissal rates cannot be significantly reduced. He finds that the chief cause of dismissal is insufficient evidence, most often due to "withdrawal" of the victim (p. 26). Withdrawal is particularly common when the victim and offender already knew each other at the time of the offense. In such cases, the victim often considers this prior relationship more important than prosecution (p. 26).<sup>8</sup> Other withdrawals occur because the witness has been intimidated by the de-

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on collateral charges, or defendants already serving substantial prison terms for prior offenses. These statistics also omit cases where the police chose to charge a misdemeanor rather than a felony.

6. The New York City prosecution rate is based on robbery arrests, whereas the European rates are based on "known suspects whom the police could pick up," since European police do not use custodial arrest as frequently as American police at the pretrial stage (pp. 24-25). It is not clear, therefore, whether these figures are fully comparable. The arrest figures clearly represent a selected group of total complaints with known suspects—namely, cases in which the police had a legal basis to make an arrest and actually did arrest the suspect. If the legal power of the German and Austrian police to "pick up" known suspects is greater, or if the term "known suspects whom the police could pick up" assumes no exercise of discretion as to whether such suspects *should* be picked up, then the denominator for the European "prosecution rates" represents a larger proportion of complaints than the arrest figures used to compute the New York City rate. Such a definitional difference would tend to *understate* the "superior" effectiveness of the European systems.

7. For example, French defendants have no *Miranda* right to remain silent or to have an attorney present during police interrogation. However, American suspects usually waive their *Miranda* rights. See, e.g., Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DEN. L.J. 1 (1970), and authorities cited therein.

8. Assuming that this is sometimes a proper reason for dismissal, it is clearly not a sufficient reason in *all* "prior relationship" cases. See *infra* text accompanying notes 79-81.



fendant or his associates, or because the witness considers further cooperation too great a burden (in light of the number of hearings, distance to court, and so forth) (p. 27). Zeisel proposes the use of a "Victim Services Agency" to alleviate the latter problems, suggests that the wishes of the victim should receive less weight in deciding whether to continue a case (pp. 27-28), and concludes that such reforms could cut dismissal rates "perhaps by some ten percentage points" (p. 51). However, another cause of victim withdrawal—not mentioned by Zeisel—may be even more important, and more easily remedied: the victim or other key witness may fail to appear in court simply because he or she did not know when or where to appear! Recent studies suggest that improved police records and witness notification procedures could substantially decrease the incidence of witness "noncooperation."<sup>9</sup>

Zeisel next concludes that "[b]arring radical changes in the size and structure of the police force, it cannot do much better than it now does" in narrowing the gap between crimes known and arrests made (p. 29). For emphasis, he notes that the ratio of arrests to the number of *committed* crimes is even lower, since many crimes remain unreported, although he does not discuss whether it would be possible to increase citizen reporting rates. Indeed, many of the reforms in the criminal justice system that Zeisel considers unlikely to produce direct crime control effects might very well improve public respect for the system, thus encouraging more citizens to report offenses and cooperate with their prosecution. As for the arrest rate, Zeisel notes that most arrests are made at or near the scene of the crime, and that changes in police patrol and other strategies have "on the whole failed to increase the arrest rates" (p. 31). However, other studies—not cited by Zeisel—suggest that increases in the number, deployment, or arrest policies of police can have positive crime-control effects.<sup>10</sup>

Zeisel's unique plea bargaining data virtually cry out for reform of this sordid practice, but his principal focus is on the limits-of-law-en-

9. See, e.g., K. BROSI, A CROSS-CITY COMPARISON OF FELONY CASE PROCESSING 17-18 (U.S. Dep't of Justice 1979) (one-fourth of the "uncooperative" witnesses selected to be interviewed could not be located because their names, addresses, or phone numbers were incorrectly reported at the crime scene, and one-half of the remainder said that they did not receive an explanation of the major steps in the court process; many did not even know where they were supposed to go and what they were supposed to do); see also F. CANNAVALE, JR., IMPROVING WITNESS COOPERATION 5-19 (W. Falcon ed. 1976) (most witnesses interviewed denied being uncooperative, and some prosecutors admitted overusing this rationale to justify dismissals to their supervising attorneys).

10. See, e.g., J. WILSON, THINKING ABOUT CRIME 89-97 (1975); J. WILSON & B. BOLAND, THE EFFECT OF POLICE ON CRIME (Urban Institute 1979). In a recent Minneapolis study, the police were randomly directed to respond in one of three ways to domestic assaults not involving actual or potential serious injury: with arrest, removal of the offender from the scene, or advice to the parties. The study found that victims were almost twice as likely to be attacked again if the police did not make an arrest. L. SHERMAN & R. BERK, THE MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT (Police Foundation 1984).

forcement thesis. He therefore concludes that, overall, plea bargaining reform will not significantly increase the punitive impact of the criminal justice system. There is certainly data to suggest that limitations on plea bargaining will increase the number of trials and decrease the number of convictions and custody sentences, at least in the short run.<sup>11</sup> However, as discussed more fully in Part II below, Zeisel's handling of his plea bargaining data in chapter one is quite selective—both the complete data in his later chapters, and other recent literature, suggest that it may be feasible to eliminate at least some forms of plea bargaining without significantly increasing the cost of the criminal justice system or reducing its punitive impact.

As for the problem of bail jumping, Zeisel is probably right that this primarily affects cases of lower priority, and that efforts to reduce the jump rate might require additional funding. Indeed, many of the defendants who jump bail may be unconvictable; thus, insuring their appearance will not increase the conviction rate. On the other hand, many disappearing defendants may have been sufficiently "punished" by the costs and hardships incurred up to the point of bail forfeiture, without the need for "conviction." These alternative explanations might have been addressed using the New York City data, but were not. More importantly, the injustices and irrationalities of the bail system call for immediate reform, whether or not this has any impact on conviction rates or crime control, a subject discussed more fully in Part II.

Zeisel also argues, based principally on data other than the New York City study, that greater sentence severity cannot significantly increase the incapacitative or deterrent impact of the law. As for incapacitation, he is probably correct that the doubling of prison sentences for all armed robbers might have a limited effect on robbery rates, and, of course, would be very expensive. However, he does not adequately discuss the possibilities of increased sentences for only the most risky offenders, and there is some empirical evidence to suggest that these offenders can be identified on the basis of the length of their prior records.<sup>12</sup>

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11. See, e.g., K. CARLSON, MANDATORY SENTENCING: THE EXPERIENCE OF TWO STATES (National Institute of Justice 1982) (1973 New York drug law, which includes mandatory sentences and restrictions on plea bargaining, produced more trials, motions, court appearances, and delay, along with fewer indictments, convictions, and prison sentences in the three years following enactment); M. RUBINSTEIN, S. CLARKE & T. WHITE, ALASKA BANS PLEA BARGAINING 119 (National Institute of Justice 1980) (abolition of prosecutorial plea bargaining increased the number of trials in three Alaskan cities by an average of 37% in the first year).

12. See, e.g., P. GREENWOOD, SELECTIVE INCAPACITATION (Rand Corporation, Report No. R-2815-NIJ, 1982); M. WOLFGANG, R. FIGLIO & T. SELLIN, DELINQUENCY IN A BIRTH COHORT 163 (1972) (juveniles that have committed three or more offenses have a probability of 0.70 to 0.80 of committing a further offense); Wolfgang, *Delinquency in Two Birth Cohorts*, 27 AM. BEHAVIORAL SCIENTIST 75, 84 (1983) (probability of a male juvenile committing a sixth violent offense, given five

Zeisel further argues that increasing the number of offenders sent to prison would have less and less of an added incapacitative effect, since the additional offenders would presumably be of lower risk than those previously sent to prison. On the other hand, perhaps such low risk offenders would be more deterred by the prospect of prison than the more hardened offenders we now commit, and in any case, we must also consider the general deterrent impact of increasing imprisonment rates (which might be financed by reducing the length of imprisonment of all offenders).

Zeisel rejects the possibility of increased deterrence, citing three sources of data: (1) the lack of evidence that capital punishment deters homicide; (2) the failure of the so-called "Rockefeller" drug laws to discourage heroin use and drug-related crime in New York state; and (3) the lack of any demonstrable effect on subsequent criminality when a group of 800 randomly selected prisoners were released nine months early in California (pp. 60-65). These data, however, reveal very little about the general deterrent effect of criminal sanctions, and particularly the marginal deterrent effect of increased penalties for crimes such as robbery and burglary. Capital punishment is clearly *sui generis*, both in terms of the ability to deter homicides (most of which are impulsive and not likely to merit the death penalty), and in terms of the perceived marginal difference between life imprisonment and the possibility of capital punishment. As for the "Rockefeller" drug laws, any attempt to deter heroin use in New York City faced an unusually difficult challenge, given the limited deterrability of drug-related behavior by addicts, the scale of the problem, and the predictable inertia of any system as massive as that in New York City. As for the California study, such a temporary experiment could only be expected to have a "special deterrent" effect on the prisoners themselves. In any case, it may very well be that *rates* of imprisonment are much more closely related to deterrent impact than length of prison terms.

All deterrence studies are further limited by the fact that our standard indices of "crime"—police statistics—measure only a small portion of the total number of crimes committed. Moreover, these measurements do not necessarily represent a constant proportion over time and across jurisdictions.<sup>13</sup> This methodological problem severely limits our ability to detect and measure any deterrent effect of increased punishment. In short, there is much we still do not know about the deterrent and marginal deterrent impact of criminal sanctions. Although Zeisel's

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prior violent offenses, is 0.568). See generally Blumstein, *Selective Incapacitation as a Means of Crime Control*, 27 AM. BEHAVIORAL SCIENTIST 87 (1983).

13. See generally F. ZIMRING & R. FRASE, *THE CRIMINAL JUSTICE SYSTEM: MATERIALS ON THE ADMINISTRATION AND REFORM OF THE CRIMINAL LAW* 46-81 (1980).

conclusions may ultimately be borne out by further research, they are not supported by the data he presents, nor does he make out a convincing case for abandoning further research efforts and experiments with selective use of increased penalties for deterrent purposes.

Zeisel's argument against deterrence is also based in part on data from the New York City study showing, for instance, that the risk of being sent to jail after committing theft-motivated burglary is only 0.3 percent, and most jail sentences are for less than one year. He concludes: "[W]hy should an increase of these sentences significantly affect their deterrent threat?" (p. 67). But one can just as easily speculate in the opposite direction: the lower the current level of sentencing severity, the more likely it is that increased severity would increase the deterrent effect, without risk of reaching the point of diminishing returns.

Zeisel is probably on strongest ground when he argues that any increase in general deterrence must be weighed against the strong possibility that sending young offenders to prison will make many of them worse than they were before they entered. In many jurisdictions this is probably also true of jail sentences, certainly in the case of the former Manhattan House of Detention—the infamous "Tombs." But surely we must no longer tolerate such conditions in our local jails. Indeed, in jurisdictions where jails are relatively new, humane, and safe, the increased use of short jail terms might well have a much greater deterrent than criminogenic effect.<sup>14</sup>

Lastly, Zeisel argues that law enforcement "acts only after the event, and it confronts the law breaker at a point in his life when it is usually too late to change course" (p. 84). This argument leads naturally to the conclusion that we must emphasize preventive efforts and work with future criminals at a much younger age. There is no disputing the point that better locks, better street lighting, indelible motor vehicle serial numbers, electrical antitheft devices, and so forth can have a major crime-preventive impact, provided they are employed widely enough to avoid simply displacing crime geographically.

Moreover, it may very well be that the best time to mold law-abiding character is in the earliest years of life. On the other hand, there are practical and philosophical limits to the power of American government, state or federal, to intervene and mold the character of its youngest citizens. In addition, much of the data on delinquency suggest that among youth, crime is the rule and not the exception. Most youth engage in some criminal activity, but what distinguishes criminal from law-abiding adults is that the latter desist while the former continue to engage in

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14. Zeisel concedes that at least at the lower end of the crime spectrum (e.g., drunken driving), increased prison sentences have a deterrent effect (p. 58).

criminal activity in their teens and early twenties.<sup>15</sup> The criminal justice system may indeed have a limited impact on these critical decisions to desist or continue, but there are no data (at least that I am aware of) to suggest that the system has *no* impact, or that its impact cannot possibly be increased. Again, what we know about the causes of crime and the primary determinants of criminal careers is dwarfed by what we do not know.<sup>16</sup>

One of the reasons we know so little about the effectiveness of criminal justice programs in producing deterrent, incapacitative, or rehabilitative effects has to do with the traditional conservative bias of social science research. Social science presumes that programs have no effect and will only discard this "null hypothesis" when confronted with overwhelming proof of effectiveness (typically 95 percent or 99 percent certainty that the results are not due to chance). However, statistically "insignificant" differences, particularly when they continue to be found in a number of independently conducted studies, may offer convincing proof of program effectiveness.<sup>17</sup> Nevertheless, the message that the criminal justice system and its programs are ineffective is a popular one these days, because it clears the way for adoption of the "just deserts" model of sentencing, based principally on the seriousness of the current offense. Although the current debate over sentencing policy is beyond the scope of Zeisel's crime-control focus, he implies disapproval of the "just deserts" approach when he concludes that "*retribution must lose its prestige as a rationale for punishment*" (p. 74) (emphasis in original).

But what, then, are the purposes of punishment, if not either crime control or retribution? Although Zeisel does not seem to embrace the notion of "punishment for its own sake," both the title of his book and the thrust of the conclusions in chapter one lend considerable support to the antiutilitarian "new retributivism." All this is not to suggest that the current preoccupation with consistency and proportionality in sentencing is misplaced, but only that we must not conclusively presume that all utilitarian purposes of punishment have been proven unattainable. For those who prefer to focus on "just deserts," however, such a conclusion is convenient.

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15. See, e.g., PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND CRIMINAL JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 43-44 (1967); M. WOLFGANG, R. FIGLIO & T. SELLIN, *supra* note 12, at 162-63.

16. Although Zeisel does strongly encourage further research on effective means of treatment during the correctional phase (p. 75), the current state of pessimism about "coerced cures" (or indeed any form of the "rehabilitative ideal") makes it highly unlikely that this recommendation will be accepted and acted upon.

17. See generally Zeisel, *The Significance of Insignificant Differences*, 19 PUB. OPINION Q. 319 (1955).

## II

ZEISEL'S MORE IMPORTANT MESSAGE: THE NEED FOR  
RESEARCH AND REFORM

Following the introductory chapter entitled "Summary and Reflections," the remaining two-thirds of Zeisel's book is devoted to presenting selected findings from the New York City felony arrest disposition study. Some of this data was analyzed and reported in a monograph published in 1977 by the Vera Institute of Justice.<sup>18</sup> The *Vera Monograph* does a more thorough job than Zeisel of presenting crime-specific data on disposition patterns, devoting separate chapters to the disposition of assaultive crimes, robbery, burglary, grand larceny, and weapons cases. However, Zeisel does a much better job of discussing certain aspects of disposition and criminal justice functioning that cut across offense categories, such as bail, prosecutorial screening, and plea bargaining. He also presents important data, some of them not from the New York City study, that place the arrest and disposition data in a broader context: estimates of total crimes committed, including crimes not reported to the police; the processes by which crimes are solved and arrests are made; the demographic characteristics of persons arrested; and the incidence of drug involvement in such persons.

Zeisel generally does an excellent job of presenting the data, using easy-to-read charts that include enough information about the raw data so that interested readers may explore different dimensions or problems. He also presents a novel and very significant new research methodology for exploring the nature of plea bargaining "discounts," and reveals some of the important ways in which pretrial detention affects plea bargaining and sentencing. However, in these two areas and several others, Zeisel's "lean" presentation of his findings does not do justice to the richness of the New York City data and its significant policy implications.

*A. Charge Reduction and Plea Bargaining*

Zeisel uses innovative research methods to produce unique data on both the nature of charge reductions offered as part of plea bargaining and the estimated sentencing "price" exacted from the few defendants who insist on going to trial. However, because the data are scattered throughout chapters one, three, and five, and because of his preoccupation with the limits-of-law-enforcement thesis, the important implications for understanding and reforming the plea bargaining process are not adequately developed.

In chapter one, Zeisel measures the plea bargaining "discount" in two complementary ways. First, he examines the extent of charge reduc-

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18. VERA MONOGRAPH, *supra* note 1.

tions (for example, Class *A* felony to Class *D* felony).<sup>19</sup> Zeisel was able to distinguish those guilty plea cases in which the evidence had "deteriorated" between arrest and disposition (average reduction: 2.8 crime classes) and those where there was no deterioration (average reduction: 1.6 classes) (p. 36, figure 10). Second, for the seven defendants for whom precise data was available, Zeisel examined the difference between the most lenient sentence offered in plea bargaining and the sentence imposed after the defendant refused the offer and was convicted at trial (p. 43, figure 12). Figure 12 graphically illustrates the price of going to trial in these cases: in the five cases where both sentences were custodial sentences, the average sentence after trial was forty-two percent longer than the lowest sentence offered for a plea, and where the plea offer was probation, the two defendants who went to trial received custody sentences of two and three years, respectively. Plea versus trial sentence differentials of this magnitude seem very likely to produce what Zeisel calls "the offer that cannot be refused" (p. 137).

Although Zeisel briefly notes the distorting effect that nonevidentiary charge reductions have on criminal records and statistics (p. 37) and implies that the plea-versus-trial sentence disparities he discovered are excessive and unjust (pp. 39-42), the main thrust of his discussion in chapter one is the limits-of-law-enforcement thesis. He concludes that plea bargaining reform offers little potential for increasing the punitive impact of the criminal justice system, unless resources are substantially increased. Later chapters present important additional data on the extent of deliberate police overcharging (pp. 195-99), charge reduction patterns (pp. 127-34), and plea/trial differentials in sentencing—including a detailed, case-by-case analysis of twenty-one sample defendants who went to trial, with emphasis on the apparent reasons for "plea bargaining failure" (pp. 134-59). However, the later chapters contain little or no policy discussion, and there are few specific cross-references in each chapter to the pages elsewhere in the book where the same subject matter is addressed.

The organization and dual focus of the book thus combine to undercut the value of Zeisel's unique plea bargaining data. Moreover, the data

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19. At the time of Zeisel's study, New York law provided a perfect vehicle for prosecutorial charge bargaining, with five classes of felony, two classes of misdemeanor, and lesser offenses known as Violations and Infractions. For Class *B* and *C* felonies the minimum sentence was one year, whereas for Class *D* and *E* felonies the minimum sentence was one day. In contrast, the highest class felony—Class *A*—carried a minimum sentence of 15 years. The maximum possible sentence for felonies of class *A* through *E* ranged from four years to life. Misdemeanors of Class *A* and *B* were punishable up to one year and 90 days, respectively, with no minimum sentence (p. 128, table 4).

There were three classes of homicide, robbery, burglary, grand larceny, possession of stolen property, forgery, and sale or possession of narcotics; four classes of rape and other sexual misconduct, and criminal trespass; one class of possession of a dangerous weapon; and five classes of assault and related offenses. VERA MONOGRAPH, *supra* note 1, at 11-12.

in chapters two through five contradict, to some extent, the conclusions reached in chapter one. For example, six of the seven defendants discussed in chapter one received a higher sentence after trial than that offered for a plea. But of the twenty-one defendants whose cases are analyzed in chapter three, only eight (thirty-eight percent) appeared to fare worse by going to trial; eight defendants fared better, and five did about the same.<sup>20</sup> This reading of the data is consistent with what might be called the "risk elimination" model of plea bargaining, in which the parties agree on an intermediate disposition to avoid the more extreme possibilities—for example, acquittal or a maximum sentence—that might result if the case went to trial.<sup>21</sup> According to this model, plea bargaining "concessions," although sometimes extreme, are also often illusory. This in turn suggests that "abolition" of plea bargaining would not necessarily produce any major change in the overall conviction rate and sentence severity. Viewed in this light, plea bargaining reform involves less drastic change (and hence, is more feasible) than Zeisel's data in chapter one would suggest.

Chapter three also clarifies a central ambiguity in the chapter one data: the custody sentences imposed after trial are *maximum* sentences,

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20. The 21 defendants analyzed in chapter three *include* the seven analyzed in chapter one. The selection of these seven defendants was apparently based on the availability of information about the precise sentence offered in return for a plea; if no plea offer was made, or the plea offer related only to the *type* of sentence (e.g., "some prison") or a proposed charge reduction, no *quantitative* comparison of the plea/trial differential could be made. Zeisel presumably also chose to exclude acquittals for the same reason, although in at least one such case the plea offer (10 years) could have been quantitatively compared to a "sentence" after trial of zero years.

My analysis of whether defendants did "better," "worse," or "about the same" at trial breaks down as follows. The eight defendants who did "better" included five who were acquitted and three who were convicted on lesser charges (cases 5, 6, 10). The eight defendants who did "worse" at trial included six (also analyzed in chapter one) who received numerically higher sentences, and two (cases 18 and 20) who were convicted of a higher level crime than was offered in return for a plea. The five defendants who did "about the same" included the chapter one defendant (case 7) who received the same sentence and crime level as offered in return for a plea, three defendants (cases 9a, 11, 15) who were found guilty at trial of the same charges they were asked to plead guilty to, and one defendant (case 12) who did both worse and better at trial—i.e., he was found guilty of a Class D felony (the plea offer was for Class A misdemeanor) but received a sentence of probation (the plea offer contained no assurance of avoiding jail).

21. Cf. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 683-716 (1981), which criticizes recent theories characterizing plea bargaining as a form of dispute resolution allowing the parties to "justify 'intermediate' dispositions by which both sides avoid the risks of litigation." *Id.* at 652.

The variable results at trial may include more than the risks of acquittal versus the increased sentence caused by denial of charge concessions or favorable sentence recommendations. Defendants may be found guilty of *lesser* offenses at trial than those offered in return for a plea, and differences in judicial sentencing policies may add a further element of variation, both up and down from the sentence agreed to in a plea bargain. In courts where the identity of the trial judge is not known until the day of trial, plea bargaining serves as a way of evening out such sentencing disparities. The judge may accept a more moderate, negotiated sentence than that which he or she would have imposed after trial.



subject to considerable parole discretion (p. 153).<sup>22</sup> Thus, the true plea/trial differential is probably less than that suggested in chapter one. Of course, for the two defendants in chapter one who were offered probation for a plea, the two- and three-year sentences they received after trial *had* to represent increased punishment, assuming that the trial judge would have accepted a plea in return for probation in such cases.<sup>23</sup> These two cases, therefore, illustrate a type of plea bargaining that may be particularly coercive: the offer of probation where there is at least a substantial risk that the trial judge would impose a custody sentence.<sup>24</sup>

Both in chapter one and chapter three, Zeisel recognizes a further methodological problem posed by comparison of plea versus trial sentences: Are the relatively few defendants who went to trial representative of the mass of defendants who pleaded guilty, so that the sentence differentials imposed on the former can be taken as indicative of the additional punishment which *would* have been imposed on the latter, had they gone to trial? Zeisel's data on charge bargaining suggest that defendants who plead guilty are receiving substantial concessions in the level of conviction they could expect if they went to trial: an average reduction of 2.3 crime classes (p. 132, figure 34). He discounts the significance of this data as a measure of potential plea/trial differentials, since in most cases the trial court would have had discretion to impose a lower sentence even if a defendant was charged with and convicted of a higher class crime (pp. 35-37). However, an earlier quantitative study of Manhattan practices concluded that "the conviction charge appears to be the most important determinant of the sentence length."<sup>25</sup> Thus, charge

22. The trial sentences of all seven defendants discussed in chapter one were prison terms, the shortest being two years. For some of these sentences parole eligibility could occur immediately, and in no case would the defendant have had to serve more than one-third of the maximum sentence before being eligible for parole (pp. 128-29).

23. In one case discussed in chapter three (case 16, p. 156), the "last offer" of a plea bargain was made at trial (Class C felony with a 15-year sentence). The defendant agreed to this, but the trial judge refused to accept the plea. This case suggests a methodological problem applicable to all of Zeisel's "last-offer" versus trial-sentence comparisons. Future researchers using this method must attempt to verify that most trial judges in the court *would have accepted* pleas based on each "last offer" discovered.

24. See *infra* text accompanying notes 34-42 for a discussion of several other "worst types" of plea bargaining.

25. Shin, *Do Lesser Pleas Pay?: Accommodation in the Sentencing and Parole Process*, 1 J. CRIM. JUST. 27, 35 (1973); see also Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 97 (1968). Alschuler characterized Manhattan as a system "where bargaining concerns the level of the charge rather than the prosecutor's sentence recommendation," *id.*, whereas Zeisel's data imply that the bargaining relates more directly to the sentence. Zeisel reports that of all guilty pleas, only 6% involved "no assurance on sentence," 22% involved no assurance but did involve a charge reduction, and 72% involved an "assurance on sentence"; in 21% of the latter pleas, the "judge merely accepts [the] deal," while in 79% the "judge participates in [the] negotiation" (pp. 133-34, figure 35). It is possible, of course, that plea bargaining changed in New York City between the mid-1960's and the mid-1970's. By 1974, however, the Manhattan District Attorney had issued internal guidelines that explicitly sanctioned limited charge bargaining and prohibited all sentence

reductions, unless somehow illusory, *must* produce substantial plea/trial sentence differentials.

One interpretation of the charge reduction data is that it simply reflects reduction to the probable level of conviction at trial—that is, an illusory “discount.” The need for such a reduction can arise because the case was initially overcharged, because the evidence has deteriorated since the initial charging, or simply because the requirements of proof beyond a reasonable doubt are higher than the standard of probable cause applied at the time of initial charging. Zeisel’s in-depth analysis of “evidence deterioration” in chapter one sheds some light on this matter, but leaves several important questions unanswered. For example, we are told that the evidence had deteriorated in sixty percent of the guilty plea cases, leading to an average charge reduction of 2.8 classes; in the remaining forty percent, the average charge reduction was only 1.6 classes (p. 36, figure 10). We are not told whether the “deterioration” in the first group appears to justify the *specific* charge reduction granted—reductions in such cases could be considerably more, or less, than the evidence problems would indicate. Neither do we know whether all of the cases in the “no-deterioration” group were appropriately charged in the first place. Those cases may have been weak to begin with, or may have been undercharged. Without answers to these questions, we cannot estimate the probable after-trial sentences of defendants who chose to plead guilty instead.

In chapter five, Zeisel analyzes the problem of “overcharging” and concludes that only seven percent of all arrests involved a “deliberate overcharge, where the police know that the facts will not sustain the charge”—mostly cases of resisting arrest or assaults on the police (p. 196). These data are not specifically related to the earlier data on charge reduction. It is not clear whether these seven percent are considered cases of “deteriorated” evidence. Zeisel also discusses the “well-established and to some extent defensible police practice of lodging the maximum charge against a defendant that is compatible with the available or expected evidence” (p. 195), but does not provide any quantitative estimates of the frequency of this practice, nor does he relate it to the data on “deterioration.”

If we could statistically take into account all of the types of charge reduction that reflect case weaknesses and thus merely anticipate trial disposition, it is possible that the average “real” charge reduction would be even less than 1.6 crime classes. Nevertheless, there is reason to believe that the differential between sentence after plea and the probable

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bargaining. See Kuh, *Plea Bargaining: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 48 (1975); Kuh, *Sentencing: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 62 (1975).

trial sentence for the mass of defendants who plead guilty remains substantial. Zeisel's chapter three analysis of the twenty-one defendants who went to trial shows that six of the eight convicted defendants who did as well or better by refusing to plead guilty had some realistic basis for expecting at least a partial acquittal, or had some other understandable reason for demanding a trial (pp. 143-47, table 5).<sup>26</sup> In contrast, six of the eight defendants who did worse at trial had a likelihood of acquittal rated by Zeisel as poor or very poor, and none had any other "good reason" for demanding trial.<sup>27</sup> Such a distinction between the relatively "good" and "bad faith" exercise of trial rights has been suggested in dicta by a number of courts.<sup>28</sup> The distinction is obviously very difficult to administer, and is philosophically repugnant to those who believe defendants have an "absolute" right to put the government to its proof.<sup>29</sup> But if such a distinction is accepted by judges in New York City, one might expect that many defendants who currently plead guilty would have to fear the imposition of a substantial "bad faith" penalty if they insisted on a trial.

What we need are further data, not speculation, and Zeisel suggests a very interesting research design for obtaining it. He proposes that the plea-bargained cases be described to nonparticipating defense counsel, prosecutors, and judges, and the hypothetical question posed: "If in this

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26. The six defendants were those numbered 5, 6, 7, 9a, 10, and 12. Although defendant 12's likelihood of acquittal was rated "poor," the defendant understandably refused the plea offer, which did not include an assurance of no jail time, since the charge and defendant's record presented "a combination that hardly ever brings jail" (p. 154). Not surprisingly, four of the five defendants who were acquitted had at least "some" perceived likelihood of acquittal.

27. The six defendants were numbers 13, 14, 16, 18, 19, and 20. The most questionable inclusion in this list is number 18, who apparently went to trial because his "powerhouse" of a mother insisted on the trial of her "innocent" son (pp. 157-58). This resulted in his conviction for a Class B felony, instead of the Class C felony offered for a plea.

28. See, e.g., *United States v. Stockwell*, 472 F.2d 1186, 1187 n.1 (9th Cir.), cert. denied, 411 U.S. 948 (1973) (defendant may not be penalized for standing trial, at least if innocence is asserted in "good faith"); *United States v. Wiley*, 278 F.2d 500, 504 (7th Cir. 1960) (defendant may not be "punished because in good faith he defends himself when charged with crime, even though his effort proves unsuccessful"); *In re Lewallen*, 23 Cal. 3d 274, 276, 590 P.2d 383, 385, 152 Cal. Rptr. 528, 530 (1979) (invalidating a higher sentence imposed after trial on defendant whose "intransigence was vindicated" when he was convicted of one charge and acquitted of all the remaining charges that the prosecutor had refused to drop in plea bargaining); cf. *People v. Morales*, 252 Cal. App. 2d 537, 542 n.4, 60 Cal. Rptr. 671, 675 n.4 (1967) (reversing a higher sentence imposed after trial by a court which observed, inter alia, that "there was no effort to put on a defense because there couldn't be"). Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1046-48 (1983), also suggests that any system of jury-waiver bargaining that replaces plea bargaining should impose no "jury tariff" in "triable" cases where the "defendant has raised issues that a jury ought to have heard." Alschuler also reports an interview with a judge in a court that had "prohibited" plea negotiation, who stated that a defendant who went to trial with "no plausible defense ought to receive a more severe sentence." *Id.* at 944 n.75.

29. Apparently no such absolute right exists in civil litigation, where parties can be assessed costs for unjustifiably requiring their opponent to prove the obvious. See FED. R. CIV. P. 37(c) (expenses on failure to admit).

case the jury would find the defendant guilty, what sentence is he likely to get?" (p. 141).<sup>30</sup> However, since many cases involve problems of proof, multiple charges, or possible lesser offenses, it would probably also be necessary to describe the evidence available and ask the judges and attorneys to assume the "most likely" verdict. This methodology might also reveal the existence of any "good faith/bad faith" distinction.

Future research should consider the impact of other powerful inducements to plead guilty, beyond the offered charge or sentence concessions. Although Zeisel's discussion of the impact of pretrial detention on conviction rates and sentencing patterns clearly identifies pretrial custody as a potent cause of guilty pleas, the limitations of his data prevented him from analyzing the precise relationship between the plea offer, plea acceptance, release from pretrial detention, and sentence imposed.<sup>31</sup> Other important factors bearing on plea negotiation—noted but not discussed by Zeisel—include the identity, if known, of the trial judge,<sup>32</sup> the financial costs of going to trial, whether such costs are borne by the defendant or by the public defender's office, and the possibility of parole or probation revocation based on the current offense.<sup>33</sup> Of course, analysis of all of these factors requires large samples, high-quality and easily accessible data, and a complex analysis of interrelated variables. Zeisel's approach is more manageable, but does not ultimately tell us how significant plea bargaining concessions are, nor what would happen if such concessions were limited or abolished.

However, we need not await the results of further research to begin our reform efforts. Zeisel's data amply illustrate several forms of plea bargaining that should be regulated or prohibited. Granted, all forms of plea bargaining may be inherently coercive and a source of unjustified plea/trial sentencing disparities, but some forms are worse than others, and it is important to try to identify and selectively curtail those types

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30. Zeisel tried to apply this methodology to the participants in his sample guilty-plea cases, but the effort failed because the "defense lawyers tended to overstate the size of the differential in order to magnify their achievement[s]; prosecutor and judge had the opposite tendency because too large a differential seemed difficult to justify" (p. 141).

31. This subject is more fully discussed, *infra* Part II, Section B.

32. The author notes that in some jurisdictions the potential plea versus trial differential is increased by assigning cases of hesitant defendants to trial judges known for their sentencing severity (p. 40).

33. In at least one case discussed by Zeisel (case 210, p. 183) the 10-month sentence received after the defendant went to trial may have been insignificant, since it was concurrent with a two-year sentence he owed on a parole violation.

Another potential cause of guilty pleas may be the nature of the defendant's prior record. Cf. VERA MONOGRAPH, *supra* note 1, at 21, table F (data showing a strong correlation between severity of prior record and probability of conviction). It would be illuminating to see how many defendants who pleaded guilty had prior convictions for "impeachable" offenses. A plausible hypothesis is that defendants with such records are advised that they will be convicted at trial whether or not they testify.

even if total abolition of plea bargaining seems unfeasible or even undesirable. My own list of "worst types" includes life versus death (penalty) pleas;<sup>34</sup> in (prison) versus out bargains;<sup>35</sup> and most forms of charge bargaining,<sup>36</sup> particularly nonevidentiary charge reductions—that is, reductions below the level at which the defendant would probably be found guilty if the case went to trial (for example, reducing a clear case of armed robbery to unarmed robbery, a procedure known as "swallowing the gun"). As Zeisel points out, such charge bargains distort the true seriousness of the defendant's acts, and render court and criminal history records unreliable, but they are worse than noncharge-bargained sentence concessions for several additional reasons.

First, nonevidentiary charge bargaining allows prosecutors to exercise what is essentially judicial sentencing power by limiting the maximum sentence available to the judge and forcing the court either to defer to the prosecutor's characterization of the offense or to violate legal norms by engaging in "real offense" sentencing.<sup>37</sup> Second, nonevidentiary charge bargains undercut presumptive or determinate sentencing

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34. See *United States v. Brady*, 397 U.S. 742, 751 (1970), and other death penalty cases cited by the author (p. 41, nn.23, 25).

35. See *supra* text accompanying note 24; see also Alschuler, *The Trial Judge's Role in Plea Bargaining* (pt. 1), 76 COLUM. L. REV. 1059, 1124-25 (1976) (suggesting that a system of partial abolition of plea bargaining "might be built upon the principle that the entry of a guilty plea should never make the difference between one kind of punishment and another but should merely reduce the quantum of a particular type of punishment"); Coffee & Tonry, *Hard Choices: Critical Tradeoffs in the Implementation of Sentencing Reform through Guidelines*, in REFORM AND PUNISHMENT 155, 166-69, 170 (M. Tonry & F. Zimring eds. 1983) (noting the coercive power of charge bargains that enable defendants to avoid a presumptive sentence of imprisonment).

36. See Alschuler, *supra* note 35, at 1136-46. Certain other "worst types" of plea bargaining could be cited—e.g., bargaining over such fundamental issues as identification, or bargaining to avoid the legal determination of constitutional issues—but these types of bargaining may be taken care of by the limits on charge bargaining discussed in the text.

In its 1979 revision of the standards related to guilty pleas, the American Bar Association seems to have taken the opposite approach to that suggested here, sharply limiting the legitimacy of judicially imposed plea/trial sentencing differentials, but refusing to challenge the prosecutor's power to produce such differentials through charge bargaining. Cf. STANDARDS FOR CRIMINAL JUSTICE *Pleas of Guilty* § 14-1.8(a) (2d ed. 1982) (rejecting certain judicially imposed differentials allowed under the 1968 version of the standards); *id.* §§ 14-3.1(a), 14-3.3(b) (permitting prosecutors to make charge bargaining concessions, and taking no position on whether courts should be given the authority to approve or reject such concessions in jurisdictions that do not already grant such a power); see also *id.* § 14-3.3(b) commentary.

37. See Alschuler, *supra* note 28, at 1045-46, and authorities cited therein.

In practice, of course, prosecutorial sentence bargaining also usurps judicial power, since judges often adopt specific sentence recommendations uncritically. Maintaining a high volume of guilty pleas requires that courts rarely disappoint the sentence expectations created by the prosecutor's proposed concessions, of whatever variety. Alschuler, *supra* note 35, at 1061-76. However, sentence bargaining also allows judges to control the sentence indirectly, by letting it be known that they will not accept recommendations of less than a certain minimum for each offense. *Id.* at 1065. It may be harder for trial courts to establish such lower limits in a system of charge bargaining, since the court is entitled to assume that the charge reduction—even a drastic one—was necessitated by evidentiary problems, which are traditionally the prosecutor's sole concern. In any case, courts in most jurisdic-

reforms; in states that have adopted such reforms, the potential sentence differential that can be imposed without a charge reduction is limited, but charge bargaining still permits huge plea/trial differentials as well as unjust disparities among defendants who plead guilty.<sup>38</sup> Similarly, charge bargaining limits the power of the parole board—at least one adhering to an offense-based “matrix”—to moderate plea/trial and other sentencing disparities.<sup>39</sup>

As for charge bargains that involve dropping charges for evidentiary reasons, such as evidence deterioration and overcharging, there are fewer problems of distorted conviction records and plea/trial disparities. However, the potential coercive effect on poorly informed defendants may be even greater, since, as noted earlier, the charge reductions are greater. In any case, such illusory bargains are fundamentally dishonest and the availability of such bargains encourages prosecutors to overcharge the case initially.<sup>40</sup> Zeisel seems to accept the necessity of such charge reductions, perhaps because he recognizes that unsupportable charges must be dropped at some point. The problem is to devise procedures that require such charges to be dropped *whether or not* the defendant pleads guilty. One procedure would involve a charging cutoff point: on or before a fixed date, the prosecution would be expected to make its final screening decisions, dropping all charges that it does not intend to pursue at trial.<sup>41</sup> Some system of costs or other incentives may be necessary to enforce this procedure. If the cutoff date is sufficiently in advance of trial, this would permit the defendant to make an informed plea decision based on the

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tions have no authority to reject charge-bargained pleas without resorting to the extreme measure of finding the plea “involuntary.”

38. See generally Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for ‘Fixed’ and ‘Presumptive’ Sentencing*, 126 U. PA. L. REV. 550, 555-77 (1978).

39. Of course, parole boards have often based their decisions on dismissed as well as convicted charges—the so-called “silent beef”—a practice that undercuts both the legitimacy and the accuracy of parole board determinations. See Alschuler, *supra* note 25, at 96.

40. Alschuler, *supra* note 35, at 1143-44.

41. Cf. Alschuler, *supra* note 28, at 967-68 & n.163 (proposing the use of a “waiting period” between any downward revision of the charges and the time when defendants could enter a guilty plea; the proposal is attributed (without citation) to Professors John C. Coffee, Jr. and Michael Tonry); Parnas & Atkins, *Abolishing Plea Bargaining: A Proposal*, 14 CRIM. L. BULL. 101, 119-21 (1978) (proposing an early “charge-setting hearing” after which further revisions in the charge would require the prosecutor to present “significant new information” to the court).

To prevent charge bargaining in the period before the cutoff, it would be necessary to prohibit entry or tender of any plea to less than all of the charges. The idea is to insure that the prosecution is bound to its final charges before the defendant is in any way bound to his plea; under such circumstances, the prosecutor could not make pre-cutoff charge reductions with any assurance that the defendant would uphold his end of the bargain. However, prosecutors could still evade the cutoff by initially filing reduced or fewer than all available charges (while threatening to add higher or additional charges just before the cutoff date if the defendant has not yet pleaded guilty to the original charge). To prevent this ploy, it might be necessary to forbid even “straight pleas” before the cutoff date; alternatively, the addition of charges could be prohibited (except on a showing of newly obtained evidence).

"real" charges likely to lead to conviction at trial.<sup>42</sup>

### B. Pretrial Release and Detention

The New York City felony arrest disposition study produced unique data on pretrial release decisions, and on the relationship between pretrial custody and case disposition. Zeisel presents this data clearly, while identifying and discussing most of its major policy implications. Although the data are discussed in several chapters of the book, this topic presents fewer problems of cross-referencing, cohesiveness, and internal consistency than the plea bargaining data discussed above. Still, the major policy discussion of pretrial release problems is found in chapter one, where the emphasis is on increasing the crime-control impact of the criminal justice system. This leads Zeisel to focus on the failure-to-appear problem, giving less emphasis to the equally important problems of detaining persons unnecessarily, using pretrial detention to coerce guilty pleas, and misusing the money bail system to achieve a *de facto* preventive detention.<sup>43</sup> He concludes that the proportion of bail jumpers

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42. A similar cut-off rule would be applied to the addition of new charges, to prevent prosecutors from upping the ante in the manner approved by the Supreme Court in *Bordenkircher v. Hayes*, 434 U.S. 357, 360-65 (1978) (filing of habitual offender charge leading to mandatory life imprisonment, when defendant refused to plead guilty to forgery in return for a five-year sentence, did not constitute unconstitutional "vindictiveness" in violation of due process).

When there are collateral charges (extra counts, pending cases, and so forth) not governed by local joinder or "single behavioral incident" rules, it may be more difficult to devise a workable cut-off procedure. Even if such collateral charges are not dropped, however, defendants should at least be given accurate information about the probable sentencing impact of such charges, since many judges decline to sentence consecutively.

43. The legitimate purposes of detention (and other limitations on the pretrial liberty of the accused) have not been clearly defined by the courts. The eighth amendment prohibition of "excessive" bail does not necessarily create a constitutional right to have bail set, *see, e.g.*, *United States v. Edwards*, 430 A.2d 1321 (D.C. 1981) (en banc), nor does it clearly define the factors that courts may consider in setting or denying bail. The leading bail case in the Supreme Court, *Stack v. Boyle*, 342 U.S. 1 (1951), suggested in dicta that the only constitutionally recognized purpose of bail is to assure the defendant's appearance at trial, but the possibility of other purposes was not relevant to the disposition of that case. One such purpose—prevention of further crime by the accused in the period prior to trial—was explicitly recognized in a 1970 federal statute applicable to "local" (i.e., not federal) offenses tried in the District of Columbia; that purpose, and the statute implementing it, were upheld in the *Edwards* case. Preventive detention of juveniles has also recently been upheld by the Supreme Court. *See Schall v. Martin*, 104 S. Ct. 2403 (1984). Chapter I of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§ 201-203, 98 Stat. 1976, 1976-85 (1984), contains an adult "preventive detention" provision applicable to all federal offenses, so it seems likely that the legality of such detention will soon be decided by the Supreme Court. Regardless of how the issue is decided, however, it has long been recognized that judges can achieve preventive detention *without* express statutory authorization by simply setting money bail at a figure higher than the defendant can afford. *See infra* text accompanying notes 76-77.

Pretrial detention can also be viewed as serving several additional purposes. Closely related to, but distinct from, preventive detention is the goal of preventing the defendant from threatening witnesses, tampering with the evidence, or otherwise improperly interfering with prosecution of the charges. *See infra* text accompanying notes 73-74. This purpose has been approved by the courts, at least where it can be shown that the defendant has *already* threatened one or more witnesses. *See*

in the New York City sample, (nine percent of all defendants released or about six percent of total defendants) is excessive, and must be brought down by more active enforcement of warrants for bail jumping and more regular collection of forfeited bonds.

Apart from the failure-to-appear issue, Zeisel's major focus in chapter one is the effect of pretrial detention on case disposition. He concludes that pretrial detention causes increased conviction and custody sentence rates among detained defendants and suggests the mechanism by which this effect is produced: the so-called time-served plea. Custody sentences are more common among defendants held in pretrial detention because "the judge will be tempted to impose a custody sentence equal to the time spent in detention, thereby legitimizing the past detention" (p. 47).<sup>44</sup> The defendant in pretrial detention is also more likely to be convicted because, at some point, he will have served a period of detention equal to the prosecutor's proposed sentence, and can be released immediately in return for his plea of guilty. Continued insistence on trial (assuming trial is not immediately available) can, therefore, only yield further "unnecessary" detention.<sup>45</sup>

The data presented in chapter five provide further support for Zeisel's chapter one conclusions. Data are first presented on the nature of the money bail, if any, required by the court, and whether or not it was posted by the defendants. Perhaps somewhat surprisingly, given the long history of bail reform in New York City, only thirty-four percent of the defendants were released on recognizance, and almost one-third did not

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United States v. Gilbert, 425 F.2d 490 (D.C. Cir. 1969). Pretrial detention also serves to coerce guilty pleas, testimony, and other forms of cooperation; assures the defendant's availability for interrogation or identification procedures; and results in the speedy imposition of informal punishment on defendants who may never be convicted or given a formal custody sentence. See *infra* note 75 and accompanying text. No court, statute, or rule has ever endorsed these purposes, nor probably ever will, but they are easily achieved by setting high money bail under the guise of assuring the defendant's appearance at trial.

44. Although Zeisel limits his conclusion to defendants who plead guilty after having spent some time in jail, the need to "legitimize" past detention seems equally applicable to defendants found guilty at trial.

45. Cf. Mills, *I have nothing to do with Justice*, LIFE, March 12, 1971, at 56, 62:

"When will [trial] be?"

"In a couple of months. Maybe longer."

Santiago has a grip on the bars. "You mean if I'm guilty I get out today?"

"Yes."

"But if I'm innocent, I got to stay in?"

"That's right."

Even if a defendant's plea does not secure his immediate release from jail, the usual practice of giving credit for any time spent in pretrial detention against a prison or longer jail sentence means that the longer the defendant stays in pretrial detention, the less time he has remaining to serve if he is found guilty or pleads guilty. A released defendant, on the other hand, encounters no such decreasing term of the sentence he would have to serve if convicted. For further discussion of different types of "time-served" pleas, see *infra* text accompanying notes 51-52.



obtain release, at least not immediately.<sup>46</sup> Zeisel then discusses the inherent problems of any pretrial detention system—that some defendants will be detained who would pose no risk of nonappearance (henceforth, “false positive” predictions of risk), whereas other defendants will be released who then fail to appear (“false negatives”). He concludes that we cannot measure the extent of the false positive problem without conducting a controlled experiment in which more defendants in the experimental group are released than in the randomly selected control group. We *can* measure the false negative rate, however, by analyzing the incidence of failures to appear. Zeisel presents data from the New York City study suggesting that the great majority of nonappearing defendants have little to fear in terms of sentencing severity, based on the crime charged and their criminal record. From this finding, he concludes that these defendants failed to appear primarily because the “consequences of disappearing are negligible” (p. 217), which in turn suggests that such consequences should be made more onerous.

Finally, Zeisel presents considerable data from the New York City study suggesting that defendants in pretrial custody are more likely to be convicted and receive custodial sentences than defendants who make bail. Recognizing that the bail decision may be *based on* the perceived likelihood of conviction and custodial sentence, he attempts to control for the crime charged, the defendant’s prior record, and the strength of the evidence, and finds that the adverse position of the defendants in jail still holds within the smaller, presumably more comparable groups of bailed and jailed defendants. He also presents some case histories illustrating the use of the time-served plea.

As Zeisel points out, there are a number of factors *other than* the time-served plea that we might expect to contribute to the greater likelihood of conviction and custody sentence for detained defendants: lesser ability to consult with counsel and assist in preparation of the defense, lesser ability to afford the services of investigators and expert witnesses, greater availability to the police for lineups and interrogations, and poor physical appearance in court, after weeks or months of incarceration (p. 223<sup>47</sup>). One might suggest several other factors as well: the lesser ability of detained defendants to “persuade” witnesses not to testify or to learn about the withdrawal of key witnesses, and the likelihood that prior adverse bail and detention decisions may bias the court that imposes the sentence. Defendants who were unfit for pretrial release are presumed

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46. Apparently, the data available to Zeisel and the authors of the *Vera Monograph* did not include final bail amounts and pretrial release status. Zeisel states that “[s]ome of these [detained] defendants (their number has not been determined) make bail at some later point prior to the disposition of their case” (p. 208, n.7). See also *infra* note 53 and accompanying text.

47. The author cites Angel, Green, Kaufman & Van Loon, *Preventive Detention: An Empirical Analysis*, 6 HARV. C.R.-C.L.L. REV. 289, 348-49 (1971).

unfit for probation, and in any case have not had an opportunity to demonstrate their reliability if released.

The number and seeming plausibility of these factors might suggest that there is no need for quantitative proof of the adverse effect of pretrial detention. Indeed, there would seem to be reason enough to minimize pretrial detention already, such as administrative cost, inhumane jail conditions, and violation of the presumption of innocence. But if one is going to use statistical data to prove the "jail effect," it will have to be done by methods more sophisticated than Zeisel's, probably by multiple regression models that simultaneously control for the large number of variables that can make certain defendants both more likely to be jailed before trial and more likely to be convicted and given a custody sentence.

Zeisel states this problem clearly enough, but never satisfactorily resolves it. He first compares custody sentence rates among defendants initially charged with each of the five classes of felony, and then separately compares the custody rate for the defendants in each of four criminal record categories. However, as Zeisel demonstrates elsewhere in his book (p. 135, figure 36), charged offense and prior record each has an independent impact on the severity of the sentence, so one must control *simultaneously* for these two variables.<sup>48</sup> Apparently recognizing this problem, Zeisel presents data on the likelihood of conviction for jailed and released defendants within each combination of crime class and prior record category, finding that the jailed defendants usually fare worse. For example, among crime Class *D* defendants with a prior conviction record not leading to jail or prison, detained defendants were forty-three percent more likely to be convicted than were released defendants. However, crime Class *D* includes a wide variety of offenses (for example, second degree rape, certain dangerous weapons violations, and first degree possession of stolen property),<sup>49</sup> and it is certainly possible that the jailed Class *D* defendants were charged with offenses that would have given their cases a higher likelihood of conviction, regardless of pretrial custody status.

Another competing cause of conviction rates is the strength of the evidence in bailed versus jailed cases. Zeisel recognizes this competing hypothesis, and attempts to evaluate it by using the amount of bail set as a "proxy" for strength of the evidence. However, at this stage he eliminates consideration of the charged offense, using only prior record and bail amount to categorize defendants, so that differences in the offense

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48. For example, although jailed defendants charged with Class *B* offenses received custody sentences 51% more often than released Class *B* defendants, perhaps the jailed Class *B* defendants had much more serious prior records, which caused their higher custody sentence rate.

49. See VERA MONOGRAPH, *supra* note 1, at 11.

charged (and other unmeasured variables)<sup>50</sup> could easily explain the bail/jail conviction rate difference Zeisel discovers.

Given the inherent inconclusiveness of these kinds of one- and two-variable comparisons, it is unfortunate that Zeisel did not devote more energy to analyzing the principal mechanism he suggests is responsible for bail/jail disparities: the time-served plea. Indeed, Zeisel does not even present any statistical evidence as to the frequency of such plea bargains and the extent to which their frequency coincides with the apparent jail effect in different groups of defendants. It would also be useful to distinguish between time-served pleas that produce a defendant's immediate release from jail, as opposed to those that merely recognize earlier periods of pretrial detention for a defendant who obtains release from jail prior to sentencing.<sup>51</sup> I would expect the latter type of time-served plea to have less appeal to defendants. Particularly in light of the notoriously bad conditions in Manhattan's former House of Detention, an offer of the former variety of time-served plea might well be irresistible—another "offer that cannot be refused."<sup>52</sup> We also need to look at offers of non-custodial sentences made to jailed defendants (twenty-five percent of convicted "jailed" defendants in New York City did not receive a jail or prison sentence). Such an offer can be made even earlier in the case, and is also likely to prove irresistible.

The reasons for these omissions are not apparent from Zeisel's book, but the earlier *Vera Monograph* suggests that the necessary data were unavailable: not all time-served sentences were explicit enough to be identifiable, and even in the smaller, in-depth sample, the data did not always reveal whether the defendant was in custody or released at the time of sentence.<sup>53</sup> Somewhat surprisingly, Zeisel does not include such critical pretrial custody status data in his list of proposed improvements in law enforcement and research statistics, discussed in chapter five. Clearly, future research must attempt to analyze the precise timing of the plea offer, plea acceptance, release from custody, and sentence imposed, so as to clarify the role of pretrial detention in the plea bargaining process.

Assuming that Zeisel is correct in his conclusions about the "jail

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50. An example of an unmeasured variable is the "prior relationship" or "stranger/non-stranger" distinction, which Zeisel elsewhere demonstrates can have a major impact on the likelihood of conviction (p. 168, figure 41) (9% of "stranger" robbery cases are dismissed or acquitted versus 61% of "nonstranger" robbery cases).

51. Zeisel's group of "jailed" defendants includes an unknown number who made bail prior to disposition. See *supra* note 46; *infra* text accompanying note 53.

52. See *infra* text at beginning of Part II, Section A; see also pp. 137-41.

53. VERA MONOGRAPH, *supra* note 1, at 17 n.\*\*, 18 n.\*; see also *supra* note 46. The two samples used in the New York study are described *supra* in note 1.

effect," what should be done about it?<sup>54</sup> He considers the possibility of making a speedy trial available to jailed defendants, but finds this solution ineffective; a "reasonable" speedy trial limit of three months from arrest to trial or plea would not be speedy enough, he says, since many time-served sentences are for three months or less. This is pure speculation, of course, in the absence of any data on the number and length of such sentences. In any case, the offer of a two month time-served plea must gain *increased* coerciveness from the inability of the jailed defendant to obtain a trial within a reasonable time *after* the offer is made: the classic "You mean if I'm guilty I walk and if I'm innocent I stay here for another six months?"<sup>55</sup> If defendants at least had to be tried or released from jail after three months, the prosecutor's leverage (or the "jail" part of it, anyway) would disappear at that point, and the pressure on defendants to plead guilty earlier (for example, for one or two months of time served) would be lessened.<sup>56</sup>

Other important possibilities of reform not considered by Zeisel<sup>57</sup> include efforts to improve jail conditions and to avoid pretrial detention of the defendants currently most eligible for time-served pleas, those at the low end of the severity spectrum. Jail reform is particularly important in cities like New York; it seems difficult to imagine a machine more powerfully equipped to coerce guilty pleas, whether or not defendants are

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54. Zeisel notes in passing that it is "not immediately clear in which direction one should eliminate the discriminatory effect. Should the conviction rates of the detained defendants be reduced, or should the conviction rates of the defendants on bail be increased?" (p. 49). However, the implication of most of his discussion is that jailed defendants are receiving too much punishment.

55. See *supra* note 45.

56. Cf. MINN. R. CRIM. P. 6.06 (misdemeanor defendants in custody must be tried or released within 10 days).

Of course, a speedy trial rule that increases the priority given to jailed defendants would probably (assuming fixed resources) further increase delays in the cases of released defendants. For an analysis of some of the problems involved in enacting any comprehensive speedy trial reform, particularly in the cases of released defendants who willingly waive their speedy trial rights, see Frase, *The Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667 (1976); see also F. ZIMRING & R. FRASE, *supra* note 13, at 456-92.

57. Zeisel suggests one other solution to the time-served plea problem:

Since the discrimination arises from a shift in the bargaining power of the prosecutor, it can be reduced only by reducing that discretionary power. The only way to eliminate this effect of pretrial detention would be an early, *unchangeable* decision by the prosecutor to go to trial if the defendant fails to plead guilty to the charged crime, irrespective of whether or not he is in pretrial detention. Under our practices this solution is not feasible. (p. 48) (emphasis in original).

It is unclear exactly what Zeisel is proposing here. If he is saying that prosecutors should refuse plea bargaining concessions in the case of detained defendants and insist on a straight plea or trial, the proposal seems very unfair to detained defendants and further increases the hardship they suffer. Perhaps he means that concessions should be offered far in advance of the point at which the defendant could be released pursuant to the offer, and the defendant would have to accept the offer immediately or it would be withdrawn. Again, it seems unfair to force jailed defendants to make such an early and irrevocable decision. In any case, it is not clear why either of these approaches is "not feasible."

legally or factually guilty, than the former Manhattan House of Detention.<sup>58</sup>

The need to reduce the use of pretrial detention in low severity cases may be implicit in Zeisel's discussion of bail (pp. 46-47, 208-12),<sup>59</sup> but the message gets lost because of his preoccupation with proving the "jail effect." Indeed, the latter exercise points us away from what may be the most important and needed reform in pretrial detention. Zeisel assumes that jailed and bailed defendants are (or can statistically be made) comparable in all respects affecting their likelihood of conviction and custody sentence. From this perspective, conviction and custody sentence rates should be equal for the two groups of defendants; if the rates are higher for jailed defendants, this represents injustice. It can be argued, however, that bailed and jailed defendants are, and must remain, incomparable, and that our goal should be to achieve a system in which only the defendants who will almost certainly be convicted are held in pretrial detention, and of those, primarily only those defendants who would receive a custody sentence if convicted.<sup>60</sup> In contrast to such a model, Zeisel's data reveal that thirty-two percent of the jailed defendants in New York City are not convicted, and that twenty-five percent of the convicted, jailed defendants do not receive a custody sentence. Thus, overall, forty-nine

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58. Consider the lament of the prisoner detained there, quoted by Mills, *supra* note 45 (emphasis in original):

"I don't even know what we did, and I been here 10 months, I don't see no lawyer or nothing, I ain't had a shower in two months, we locked up 24 hours a day, I got no shave, no hot food, I ain't *never* been like this before, I can't stand it, I'm going to kill myself, I got to get out, . . . ."

For further commentary on jail conditions, see generally R. GOLDFARB, *JAILS: THE ULTIMATE GHETTO* (1975); Mattick, *The Contemporary Jails of the United States: An Unknown and Neglected Area of Justice*, in *HANDBOOK OF CRIMINOLOGY* 777-848 (D. Glazer ed. 1974).

59. Consider also the implications of figure 25 (p. 101), showing that a summons is widely used in lieu of arrest for persons charged with misdemeanors and lesser offenses: about 58% of misdemeanor charges are processed by summons, and the percentage for infractions and violations combined is about 82%. Summonses are not authorized in the case of felony charges in New York City. However, other American jurisdictions permit this, *see, e.g.*, MINN. R. CRIM. P. 3.01, and some European nations make extensive use of a summons-type procedure. *See generally* Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 *BUFFALO L. REV.* 361, 369-71 (1977).

60. An analogous principle is implemented in the Minnesota Rules of Criminal Procedure, which provide that if an offense is a misdemeanor punishable by fine only, a summons shall be issued in lieu of the warrant, MINN. R. CRIM. P. 3.01; suspects arrested without a warrant and charged with such offenses "ordinarily" shall be released on citation on the scene if they agree to sign the citation, and must be so released by the official in charge of the proposed place of detention, *id.* 6.01, subd. 1(1)(a)-(b).

A more radical proposal would set a goal of detaining only defendants likely to be convicted and receive a custody sentence *greater* than the maximum duration of their pretrial detention (i.e., more than three months, assuming the speedy trial rule discussed *supra* in text following note 54). Such an approach would largely eliminate the "time-served" plea bargaining problem, since no defendant could obtain immediate release from jail in return for a guilty plea.

percent<sup>61</sup> of the detainees suffer incarceration that is not "legitimized" by subsequent conviction and sentencing.

Zeisel's discussion of the first problem (detained but not convicted) is limited to a footnote, where he cites an article proposing that an evidentiary, "probable guilt" hearing be held prior to a defendant's pretrial detention (p. 208, n.8<sup>62</sup>). However, since many unconvicted detainees are eventually dismissed by the prosecutor, a lot of detention can be avoided if prosecutors simply accelerate the screening of their cases involving detained defendants.<sup>63</sup> In addition, if defendants were entitled to some sort of compensation for pretrial detention not leading to conviction,<sup>64</sup> the system would obviously have a good deal more incentive to make screening and detention decisions carefully.

Similarly, efforts could be made to minimize pretrial detention for those defendants who will not receive a custody sentence.<sup>65</sup> However, unlike the problem discussed above, here we must deal with the possibil-

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61. The 49% consists of the 32% not convicted, plus the 17% (25% of 68%) convicted but given a noncustodial sentence. Of course, some of these defendants may have been both readily convictable and appropriate subjects for a custody sentence. The system simply did not bother to achieve these results by means of formal conviction and sentence. See *infra* note 65.

In *Schall v. Martin*, 104 S. Ct. 2403 (1984), the Supreme Court upheld a New York statute authorizing pretrial preventive detention of juveniles, and rejected the argument that such detention must be viewed as "punishment" without conviction, since many detained juveniles have their petitions dismissed, or do not receive custodial dispositions. The Court held that "the final disposition of a case is 'largely irrelevant' to the legality of a pretrial detention." *Id.* at 2415. However, much of the Court's reasoning emphasized the traditional paternalistic treatment-oriented approach of the juvenile court, so the holding may be limited to that context. Even if the ruling is deemed applicable to adults, such a narrow interpretation of the constitutional limitations applicable is not inconsistent with the view expressed here—that as a matter of policy, "wasted" pretrial detention of persons who do not legally merit a custody sentence must be kept to an absolute minimum.

62. The author cites Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 WIS. L. REV. 441. Of course, such an explicit "prediction of guilt" raises both theoretical and practical problems. In particular, procedures would need to be devised to insure that the trial jury is not informed of the earlier prediction.

63. Although Zeisel tells us that 44% of all dispositions are by "dismissal" (p. 19), most often at the preliminary hearing stage (p. 123, figure 30), it is not clear how many of these dismissals were contested by the prosecution, nor do we know precisely how many involved detained defendants. Assuming that a substantial number of detainees are screened unilaterally by the prosecutor at some point, it is also unclear whether prosecutors could accelerate very many of these decisions, or whether they would want to. Pretrial detention can be used to coerce a guilty plea, with dismissal coming later if the defendant refuses to plead guilty or if evidence is subsequently lost. Thus, we need more research on the timing and reasons for nonconviction in detainee cases.

64. Such compensation may be awarded in France whenever pretrial detention has caused the defendant "a manifestly abnormal prejudice of particular gravity." CODE DE PROCEDURE PENALE [C. PR. PEN.] art. 149 (author's translation).

65. Cf. *supra* note 60. It is possible, of course, that many of the defendants in Zeisel's sample who were detained but not given custodial sentences were nevertheless considered by the court to have served time, and that if they had been released prior to trial the court would have felt some custody was necessary. Further research should attempt to discover the sentencing norms for released defendants in similar cases, and interviews with sentencing judges should determine what sentence would have been given the defendant if he or she had been released prior to trial.

ity that lowered detention rates will increase the failure to appear rate, thus slowing down or preventing conviction. Zeisel argues that nonappearance rates are already too high and that they cannot be reduced at the bail-setting stage, because we cannot predict future bail jumpers in advance (pp. 49, 214). Even accepting the latter conclusion—which is not entirely supported by the available literature on bail predictions<sup>66</sup>—one cannot conclude from Zeisel's data that current nonappearance rates are too high, nor that lower detention rates would necessarily increase nonappearance. Although Zeisel does a good job of operationally defining the "jump rate," so as to exclude temporary or inadvertent absences,<sup>67</sup> we still do not know how many of these bail jumpers were likely to have been convicted. Indeed, his data suggest that most of them were charged with low severity crimes, for which dismissal rates are high;<sup>68</sup> such failures to appear, however frequent, do not necessarily frustrate law enforcement.<sup>69</sup>

Of course, if we start to release more defendants whom we expect to be convicted and receive noncustody sentences, we must be concerned that they may abscond. Zeisel suggests that our only feasible strategies to reduce the nonappearance rate are to arrest more bail jumpers and forfeit more of their bonds, but these suggestions do not exhaust the possibilities. Studies suggest that there are fewer nonappearance problems when defendants are carefully notified of court dates,<sup>70</sup> and the incentive

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66. See, e.g., Ozanne, Wilson & Gedney, *Toward a Theory of Bail Risk*, 18 *CRIMINOLOGY* 151-60 (1980), which found that of 150 variables analyzed in three separate studies, 46 were found to be statistically significant in predicting failure to appear. Sixteen of these "predictor" variables were selected for further analysis because they could be readily obtained and verified at the time of pretrial release screening, they could be objectively and efficiently applied, and they were not objectionable on philosophical grounds. These 16 variables seemed to tap many of the same community-ties factors used since the early 1960's to make pretrial release decisions, but were significantly different in several respects. See also Goldkamp, *Questioning the Practice of Pretrial Detention: Some Empirical Evidence from Philadelphia*, 74 *J. CRIM. L. & CRIMINOLOGY* 1556, 1576-85 (1984) (development and testing of improved prediction formula).

67. Noting the problem of "involuntary" nonappearances, Zeisel defines bail jumpers to include "all persons whose arrest warrant had not been returned by the time, at least several months later, when our data were collected and the cases recorded as not disposed" (p. 214 n.14). Such a definition also excludes certain "intentional" nonappearances—e.g., to avoid a particularly severe judge who would hear the case on the day set for trial.

68. See figure 57 (p. 216) (78% of bail jumpers were charged with crime Classes C, D, and E, and had no record or an "arrests only" record); figure 29 (p. 113) (for defendants charged with crime Classes D and E, dismissal rate was 76% with no record or a minor record, versus 20% for defendants with a major record).

69. Some of these cases may represent informal "convictions," in which the bail or other collateral forfeited by nonappearance is considered to be equivalent to a fine. Such informality is troubling, particularly in serious cases, although it is noteworthy that many countries permit conviction, and even sentencing to incarceration, in absentia. See *infra* text accompanying note 72.

70. See, e.g., NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, *HOW DOES PRETRIAL SUPERVISION AFFECT PRETRIAL PERFORMANCE?* (1978) (300 randomly selected felony cases in Washington, D.C., randomly assigned to three levels of pretrial supervision—passive, moderate, and

to appear might also be increased by enforcing criminal penalties for willful nonappearance. Both of these alternatives may be expensive, however. A cheaper option might be to abolish bail bonds and substitute cash deposits, thus insuring that defendants have a personal stake in the bail forfeiture.<sup>71</sup> We might also make the threat of arrest and denial of further release more explicit to defendants being released. Finally, we might even consider more frequent use of trial in absentia for defendants who are clearly shown to have had notice of the charges and the trial date. This procedure is widely used in other countries,<sup>72</sup> even for serious offenses, and significantly reduces the justification for pretrial detention.

Perhaps the real reason why we refuse to release more accused defendants is that we fear them. Specifically, we fear that they will either interfere with the evidence or witnesses, or will commit further crimes while awaiting trial. Of course, the interference problem is immaterial if the defendant could not be convicted even if detained. Pretrial detention of the "dangerous" is equally hard to justify for such unconvictable defendants, and is logically unnecessary for those who will not receive custody sentences. Thus, the only "preventive detention" issue raised by my proposed pretrial release model is the risk of "interference" by convictable defendants who will not receive a custody sentence. Assuming that this is a serious problem—and there is little data to suggest that it is<sup>73</sup>—there are ways of dealing with it short of preventive detention at the outset of the case. These include explicit threats of revocation of release, backed up by a willingness to follow through; use of depositions to "freeze" witness testimony;<sup>74</sup> and giving "speedy trial" priority to cases posing the greatest risk of interference.

Other, less frequently articulated reasons for detaining defendants in less serious cases are the desire to coerce pleas<sup>75</sup> and/or to informally

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intensive—produced the following percentages, respectively, of subjects who made all required court appearances: 95%, 96%, and 98%). See generally C. ESKRIDGE, PRETRIAL RELEASE PROGRAMMING: ISSUES AND TRENDS 146-48 (1983).

71. See generally F. ZIMRING & R. FRASE, *supra* note 13, at 313-20.

72. See, e.g., CODE DE PROCEDURE PENALE [C. PR. PEN.] arts. 270, 319-320, 410, 412, 487-495, 544-545, 627-641 (FRENCH CODE OF CRIM. P. arts. 270, 319-320, 410, 412, 487-495, 544-545, 627-641 (G. Koch trans. 1964)).

73. However, the high dismissal rate among cases involving a "prior relationship" between the victim and the defendant, see *infra* text accompanying notes 70-82, might suggest problems of witness intimidation. Of course, these cases involve defendants whom the system already releases. We know nothing about the witness or evidence tampering risks in low severity cases where defendants are now being detained.

74. Cf. Schlesinger, *supra* note 59, at 375 (noting the willingness of European courts to use pretrial statements of witnesses as substantive evidence, where the witness later contradicts the statement or claims a loss of memory).

75. Actually, there are a variety of law enforcement benefits to pretrial detention beyond coercing a plea, such as insuring the availability of the defendant for continued interrogation and identification procedures, and "encouraging" testimony and other forms of cooperation. There appears to have been relatively little research done on the extent to which police make use of these opportuni-



punish such defendants. As previously discussed, a guilty plea should not be the price of pretrial release, and punishment through pretrial detention is clearly illegitimate. So much for the "need" to detain—but how can such abuses be eliminated in practice? Earlier screening by prosecutors, coupled with the release of defendants unlikely to merit a custody sentence, can be achieved by prosecutors and judges with good faith and high ideals, but the abuse of pretrial detention for illegitimate purposes will not cease until the presumption of release is made explicit, and backed up by suitable enforcement procedures. The presumption might be phrased as follows: "No defendant may be detained unless the prosecution establishes a strong probability that defendant will be convicted and receive a custody sentence." Expedited appeals must be permitted and relief liberally granted.

As for the possibility of increased pretrial release in more serious cases (that is, cases involving probable custody sentences), the desire to achieve informal preventive detention looms large and poses a major obstacle to reform. Zeisel makes reference to the preventive detention controversy, but his discussion and proposed solutions do not do justice to the importance of this problem, and the possibility that it is the key to bail reform in serious cases. Zeisel implies that American courts might simply be given the explicit preventive detention powers of European and English courts (pp. 50-51), but this will not satisfy those readers who believe that such power must be subject to American standards of due process and accountability. On the other hand, American experience with detailed preventive detention statutes has been disappointing, since the statutes are not needed and will not be used if the option of detention under high money bail remains available.<sup>76</sup> Thus, limiting money bail to cases where "the danger of flight is the sole grounds for detention" (p. 50) (describing continental procedures) may not go far enough. We will probably have to abolish money bail entirely, or at least provide some procedure limiting money bail to an amount that the defendant can afford to post.<sup>77</sup> The former alternative would require amendment of most state constitutions, which generally recognize a right to bail. Either

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ties. To some extent the detainee's right to counsel provides a safeguard here. *Cf.* *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (defendant's sixth amendment right to counsel attaches at the commencement of "adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment"); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

76. See generally F. ZIMRING & R. FRASE, *supra* note 13, at 334-42 (discussing the disappointing experience with the 1970 District of Columbia preventive-detention statute).

77. The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§ 201-203, 98 Stat. 1976, 1976-85 (1984), appears to create a statutory "right to affordable bail" in federal criminal cases. It provides that federal magistrates and judges "may not impose a financial condition [of release] that results in the pretrial detention of the person." *Id.* § 203, 98 Stat. 1978 (to be codified at 18 U.S.C. § 3142(c)).

approach would require that new procedures be devised to deal with defendants who should not be released unconditionally: standards and hearing procedures to detain defendants who pose a demonstrable risk of flight or misconduct, and effective use of bail revocation and penalties for nonappearance or crimes committed while released. Abolition or limitation of money bail would require a willingness to spend the money necessary to supervise closely the whereabouts and activities of defendants who do not pose quite enough risk to justify preventive detention. Clearly, Zeisel's data and the implications of his analysis point in these directions, but only for those able to look past his preoccupation with the limits-of-law-enforcement thesis.

### C. Other Important Policy Issues

At the risk of making this Review longer than Zeisel's book, I have summarized below some other areas where his book gives less attention to important policy and research issues than the data merit. Although most of these omissions are probably due to space limitations in the book or to missing data in the New York City study, some may reflect a judgment that the issues are less important or that the criminal justice system is already doing about as well as can be expected. The latter interpretation is more troubling, although Zeisel would not be the only scholar to suggest that we lower our expectations for achieving ideal justice on a large scale in our criminal courts.<sup>78</sup>

#### 1. Victim/Offender Relationships

Zeisel, like the authors of the *Vera Monograph*, notes that a "prior relationship" between victim and offender makes a case much more likely to be dismissed, principally because such victims frequently withdraw or fail to appear in court (p. 25). Zeisel recommends that future research and law enforcement statistical systems record "whether the offender was a stranger" (p. 261).<sup>79</sup> Although Zeisel appears to recognize that some of these withdrawals, such as those due to intimidation or the "burden of further cooperation," may produce unjustified dismissals (pp. 27-28), he implies that the remainder are appropriate because "the continuation of the relationship may be more important than prosecuting the offense which disrupted it" (p. 26). In other words, the matter is "private."

However, the definition of a "nonstranger" used in the *Vera Monograph*, and apparently adopted by Zeisel, covers a wide variety of prior

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78. Cf. C. SILBERMAN, *supra* note 4.

79. Unlike the *Vera Monograph*, Zeisel's data rarely reflect the stranger/nonstranger distinction, an exception being figure 41 (p. 168) (61% of nonstranger robbery cases dismissed are acquitted, compared with 9% of stranger robbery cases).

relationships: family members, in-laws, other relatives, lovers, former spouses or lovers, neighbors, drinking and drug companions, other friends, neighbors and acquaintances, employers and employees, landlords and tenants, junkies and dealers, prostitutes and their customers or pimps, and other business relationships (for example, cab driver/customer) (p. 115).<sup>80</sup> The value of continuing the prior relationship is certainly not the same in all of these cases, and it is difficult to see what appropriate research or management use would or could be made of a simple "stranger/nonstranger" variable.

Moreover, even if the relationship of the parties invokes significant privacy interests, we need to know much more about the nature of the offense charged, the suspect's likely dangerousness to nonacquaintances, and the explicit—not inferred<sup>81</sup>—reasons for withdrawal, before we can pass judgment on whether dismissal is in the interests of justice. Finally, even if one accepts the "stranger/nonstranger" distinction or something similar to it, the conclusion that "stranger" cases have a higher priority and fewer witness problems certainly requires that we reanalyze Zeisel's "attrition" data to see how well we do in enforcing these more serious offenses.<sup>82</sup>

## 2. *Disparity Versus "Rough Justice"*

The presentation of bail setting, charge reduction, and sentencing data in the aggregate leads to the impression that, despite its many problems and inadequacies, the criminal justice system ultimately succeeds in delivering consistent, proportionate justice, at least in relation to charged offense and prior record. The authors of the *Vera Monograph* and other recent books<sup>83</sup> make this conclusion explicit; Zeisel only hints at it in the introduction: "In its own terms, law enforcement, although flawed in many respects, works reasonably well" (p. 4). Yet such "average" figures still leave room for considerable variation from case to case, depending on the identity of the prosecutor,<sup>84</sup> defense counsel, and espe-

80. See also VERA MONOGRAPH, *supra* note 1, at 19-20, 27, 67, 68, 106.

81. The researchers in the New York City study did not talk directly to the complaining witnesses (p. 115 n.2). Zeisel's analysis of the complaining witnesses' reasons for withdrawal is based on 98 cases. In some of these cases the reasons were given to defense counsel who reported them to researchers; in others the reasons were inferred (pp. 114-15). Although the linkage is not made explicit, table 2 (p. 111) indicates that "known" rather than inferred reasons were only present in 33 cases (out of 159 dismissed cases in the small, in-depth sample of 369 defendants—see *supra* note 1).

82. "Stranger" cases may also involve higher rates of reporting by victims to the police. On the other hand, the proportion of reports leading to arrest is probably lower (p. 32, figure 9).

83. C. SILBERMAN, *supra* note 4, at 255; VERA MONOGRAPH, *supra* note 1, at xii, 133-37.

84. For a general discussion of the problems of prosecutorial discretion, and how one federal prosecutor's office limited filing discretion through a system of internal written reasons and supervisory review, see Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 290-304 (1980).

cially the judge. It is unclear whether these actor variables were included in the New York City data, but they are certainly an important part of any model system of criminal justice statistics, and any thorough evaluation of disposition patterns.

Sentencing disparity deserves particular attention, given the current interest in sentencing reform. Indeed, it is arguable that reform of sentencing discretion is at least as important as (and perhaps even a prerequisite to) reform of plea bargaining and pretrial release. The relationship between plea bargaining and sentencing is obviously a close one. There is limited value in eliminating prosecutorial charge bargaining, as recommended in this Review, if judges remain free to impose widely different sentences on defendants found guilty of the same offense.<sup>85</sup> Moreover, judicial sentencing disparity may be one of the *justifications* for plea bargaining. Through charge or sentence bargaining, entered into before the identity of the trial judge is known, prosecutors and defense attorneys can substitute a moderate sentence for the sentencing extremes possible when judges have complete control over the sentence.<sup>86</sup> Highly discretionary sentencing also makes it easier to mislead defendants with illusory plea bargain "discounts" from sentences that no trial judge would impose. In any case, sentencing reform is a logical place to begin to tackle the problem of discretion, since sentences are perhaps the most visible, and theoretically the most important, of all discretionary criminal justice decisions. Once we have made a firm beginning by limiting sentencing disparity, as has been done in Minnesota and elsewhere,<sup>87</sup> the need for plea bargaining reform becomes all the more compelling, since prosecutorial charge bargaining can defeat the purposes of sentencing reform.

As for the relationship between sentencing and pretrial release, there is also reason to believe that reform of one cannot succeed without reform of the other, at least in the case of less serious offenses. It does little good to decide that certain offenders should presumptively receive a noncustody sentence if many of them are still forced to serve such sentences while awaiting trial. To avoid such wasted incarceration, this Review has proposed the goal of never imposing pretrial detention unless a defendant would almost certainly receive a custody sentence. Such a goal will be impossible to achieve in practice, however, if we do not de-

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85. Compare the results in the state of Alaska, in which elimination of most forms of prosecutorial plea bargaining did not appear to eliminate plea/trial differentials imposed by the judges themselves. M. RUBINSTEIN, S. CLARKE & T. WHITE, *supra* note 11, at 18, 119.

86. See *supra* note 21.

87. The Minnesota sentencing guidelines, in effect since 1980, are published in MINN. R. CT. 263-321. For each combination of offense and prior record, the guidelines specify whether commitment to state prison is presumptively required. If it is, the guidelines specify the term within narrow limits (e.g., 30 to 36 months).

velop sentencing norms for low severity offenses and offenders,<sup>88</sup> thus making it easier to predict the probable sentence at the time pretrial release decisions are made.

### 3. *Varieties of Prior Record*

Zeisel gives considerably less emphasis than the authors of the *Vera Monograph* to the prior record data available from the New York City study, perhaps because he objects to the way in which some prior records were used: arrests not leading to conviction appeared to count as a "minor" record, intermediate between "no prior record" and "prior convictions without imprisonment" (pp. 45, 113 (figure 29), 135 (figure 36)).<sup>89</sup> What we are not told by either Zeisel or the *Vera Monograph*, perhaps because the data were not available from the New York City study, is how many of these prior arrests without conviction represented formal pretrial diversion (or informal, "one more chance" dismissals) of convictable suspects. Zeisel wants to expunge all arrests not leading to conviction (pp. 45-46), but overlooks the possibility that the prosecutor's office will retain a record of such dispositions. Moreover, if the defendant was provably guilty the first time, consideration of the prior incident may be proper, at least in deciding whether to formally prosecute a new charge. Until this policy dilemma is resolved, we will not know how to evaluate current disposition practices and design new statistical systems.

### 4. *Other Missing Data*

Some studies have suggested that the race of the defendant and/or the victim may play a key role in the disposition of the case,<sup>90</sup> but this variable is never mentioned by Zeisel, perhaps because it was not recorded in the New York City data. Nor did he analyze the effect, if any, of different types of defense counsel (full-time public defender, other appointed counsel, retained counsel), which is at least a proxy for the social class of the defendant, if not a measure of the different styles and impact of these different forms of representation. Finally, nothing is said about any time-lapse variables, such as the length of pretrial detention and the

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88. Compare the new sentencing guidelines which became effective in the State of Washington on July 1, 1984, which apparently are not limited to felonies, but which provide presumptive noncustody sentences for only 3 out of 130 crime and prior record combinations. WASHINGTON SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE 7 (1983); see also Alschuler, *supra* note 28, at 956-61 (proposing a "penal order" system modeled after European procedures in which the prosecution would normally decide which misdemeanor defendants should be offered a noncustodial sentence, whether they plead guilty or demand trial).

89. See also VERA MONOGRAPH, *supra* note 1, at 21, table F.

90. See, e.g., Zimring, Eigen & O'Malley, *Punishing Homicide in Philadelphia: Perspectives on the Death Penalty*, 43 U. CHI. L. REV. 227, 232-33 (1976) (black felony-murder defendants with white victims received more severe sanctions and had more jury trials than black felony-murder suspects with black victims).

delays between each step of the disposition process. Such data are obviously critical to evaluation of "speedy trial" and pretrial detention issues, and as suggested earlier in the discussion of plea bargaining, they may also shed considerable light on the reasons for a particular disposition. All of these variables may have less impact on disposition than plea bargaining concessions and pretrial detention, but their potential impact—and the possibility of injustice—cannot be ignored in any thorough evaluation.

### CONCLUSION

There is certainly much that is wrong with the quality of criminal justice in the United States, and much that we still do not know about how to set it right. Research and reform, however, are usually difficult, expensive, and slow. It is also undoubtedly true that the crime-controlling power of the criminal justice system is limited, and that efforts to even modestly increase that power are equally difficult, expensive, and slow. But these basic truths provide all the more reason to be wary of a book which implies that research and reform are of lesser importance, and which argues forcefully that the "answer" to our crime-control needs is to be found outside the criminal justice system.

One thing that the criminal justice system does *not* need in the near future is a period of neglect, benign or otherwise. Problems such as coercive plea bargaining and unnecessary pretrial detention will not go away by themselves; they are too entrenched in recent traditions, and too convenient for those responsible for these decisions. Moreover, the ideal time to address these problems may be right now, before the end of the current "baby bust" cycle of declining crime rates and stable, if not declining, arrest rates.<sup>91</sup> Perhaps a similar demographic "window of op-

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91. See FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTS 1983, at 43, table 1 (1984) (for seven "index" crimes measured, rates of crime reported to the police, per 100,000 inhabitants, peaked in 1979, 1980, or 1981, depending on the offense, and then declined steadily through 1983); *id.* at 168 (total number of arrests (not adjusted for population growth) continued to rise through 1982, but then declined by 3% in 1983 (5% for index crimes)); *id.* (arrests of persons under 18 fell 10% in 1983 (8% percent for index crimes)); see also U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES 1983, at 3, table 2 (1984) (victimization rates per 1,000 population peaked in 1979 or 1981 for five surveyed offenses; peaks for the other four offenses were in 1974, 1975, or 1977; rates for all offenses declined from 1981 to 1982 and preliminary figures for 1983 show further declines (except for rape)). Some observers have suggested that these declines are also due to increased imprisonment rates and perhaps even the changing fads of ghetto teenagers. See Zimring, *Figures Suggest Violent Crime is Going Out of Fashion*, Minneapolis Star & Tribune, Aug. 2, 1984, at 19A, col. 1.

The discussion in the text focuses on court caseloads, which should remain stable or decline in the late 1980's. In contrast, prison populations continue to rise and may not reach a peak until 1990. See generally Blumstein, Cohen & Miller, *Demographically Disaggregated Projections of Prison Population*, 8 J. CRIM. JUST. 1 (1980). My analysis assumes that plea bargaining and pretrial release

portunity" applies to Zeisel's proposed reforms in primary education, but recent increases in elementary school enrollments suggest that the window is already closing, whereas the newest baby boom generation will not reach its crime-producing peak for another fifteen years.<sup>92</sup> If we are going to make significant changes in our system of criminal justice—whether to improve the quality of justice or to better control crime—the time to do this is now, when reduced public anxiety and a better ratio of resources to caseload permit room for reform and experimentation. Time is of the essence, however. Although the lull in crime rates may last until the mid-1990's, reduced public interest in law enforcement will eventually follow the drop in crime rates, and pressures will build to reduce expenditures for criminal justice.

What should our research and reform priorities be in the near future? In research, Zeisel is clearly correct: we need more studies like the one conducted in New York City, and much of this information should be routinely collected for all cases in the system, so that it can be used for management as well as research purposes. However, this Review has argued that such future research and statistical systems must incorporate even more variables and more sophisticated analysis than employed by either Zeisel or the authors of the earlier *Vera Monograph*.

The most comprehensive studies will probably only be feasible in a few jurisdictions, and careful consideration must be given to the selection of such jurisdictions. Although New York City provided a natural setting for "pilot" research, in light of the presence of cooperative local authorities, the availability of interested and experienced researchers, and the probability of dramatic findings, the limitations of further research in such a city should be recognized. First, no matter how similar the basic functioning of criminal justice is in all American cities, criminal justice in New York City is still in a class by itself. The problems are bigger, and the solutions are even more difficult, expensive, and slow than in cities of only ordinary hugeness. Second, research in any system as large as that of New York City is more likely to encounter missing case files or entries, poor cross-referencing, vague memories, and problems of pending cases in prospective samples.<sup>93</sup> In particular, future research should probably be located in a city that has implemented the computerized Prosecutor's

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reform can be achieved without increasing the number of persons sent to prison; the same may not be true for sentencing reform at least in some jurisdictions.

92. McGrath, *Crime Expert Foresees Temporary Crime Decline*, Minneapolis Star & Tribune, May 15, 1984, at 1B, col. 1 (based on a speech in Minneapolis to the Police Foundation by Harvard Professor James Q. Wilson).

93. In the New York sample, 40 cases were eliminated from the larger sample described *supra* in note 1, because the files could not be located; another 37 cases were dropped because they were still pending when data collection ceased. Excluding juvenile and youthful offender cases, these two missing data items accounted for about 5% of all cases. VERA MONOGRAPH, *supra* note 1, at 1-2.

Management Information System (p. 230), which already captures most charge and custody variables, thus minimizing the need for expensive manual retrieval of this information from case files.

As for reform priorities, we should focus our efforts on the interrelated problems of sentencing,<sup>94</sup> plea bargaining, and pretrial release. Our short-term goals should be to eliminate at least the more coercive types of plea bargaining concessions,<sup>95</sup> and to avoid pretrial detention in all but the clearest, most serious cases.<sup>96</sup> Zeisel correctly recognizes that these are two of the areas where our criminal courts most often fail to live up to our ideals of justice, but he gives us relatively little guidance for reform. Nevertheless, his data point the way toward the most needed changes.

What about improvements in crime control? If we accept the broadest implications of Zeisel's thesis about the crime-control limits of law enforcement,<sup>97</sup> then we have all the more reason to place greater emphasis on the quality of justice in criminal courts—for we need not fear that a fair and humane criminal justice system will leave us at the mercy of criminals. On the other hand, if modest improvements in our crime-fighting efforts are possible—and Zeisel has not proven the contrary<sup>98</sup>—we may have to decide, in allocating short-term criminal justice dollars, whether increased crime control or a higher quality of justice is more important.<sup>99</sup> In that case, I submit that we should prefer improved justice because that choice is more consistent with our ideals, and because a fair and humane criminal justice system promotes respect for the law, just as a corrupt system undermines it.

Notwithstanding the critical tone of this Review, it is important to end by recognizing the significant value of Zeisel's book, for academic as well as nonacademic readers. Academics will find in it unique data, valuable new ideas for research, and an essential blueprint for the design of future system-wide empirical research and statistical systems. Nonacademic readers will benefit from Zeisel's forceful and elegant demonstration of the crime-control limits of law enforcement: the criminal law cannot drastically reduce crime, particularly in periods of rising "crime demographics" and major social upheaval, such as we experienced in the 1960's and 1970's. Ironically, it is precisely at such times that the public pressure is greatest to use the criminal law to "do something" about

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94. See *supra* text accompanying notes 85-88.

95. See *supra* text accompanying notes 34-42.

96. See *supra* text accompanying notes 59-77.

97. See *supra* text following note 3.

98. See *supra* text accompanying notes 4-17.

99. On the other hand, we may be able to pursue both goals simultaneously, if criminal justice budgets remain fairly constant while crime rates and caseloads decline. See *supra* text accompanying notes 91-92.



crime, and public expectations are likely to far exceed our capacity to effect change<sup>100</sup>—at least by means of the criminal law, and perhaps by any instrument of public policy.

But the crisis years are over, for the moment. What the public most needs to hear in the 1980's is that, although crime rates are falling, the criminal justice system needs our funding and attention more than ever. Now is the time to remake our system into one we can be proud of, and hope that the changes last through crime waves of the future. There may be some backsliding later on, but let us at least try to improve our position while we can. To paraphrase Zeisel, we need standards and procedures for criminal justice that "will hold when the dangerous years begin and will endure until they are over" (pp. 87-88).

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100. See *supra* note 3.